(2) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES

GERALD D. BUSH,
Petitioner,

v

ZEELAND PUBLIC SCHOOLS BOARD OF EDUCATION
and
CITIZENS INSURANCE CO. OF AMERICA
Respondents

On Petition For A Writ Of Certiorari
To The Supreme Court Of Michigan

PETITION FOR WRIT OF CERTIORARI

Appendix

Pro Se By:
Gerald D. Bush
724 E. Central
Zeeland, Michigan 49464
616-772-2398

May 25, 2001

91pp

ORDER

Michigan Supreme Court
Lansing, Michigan

Entered: December 27, 2000

Elizabeth A. Weaver,
Chief Justice
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

GERALD BUSH,
Plaintiff-Appellant,

v

ZEELAND PUBLIC SCHOOLS BOARD OF EDUCATION,
Defendant-Appellee.

SC: 116478, 116560
COA: 223030, 213446
State Tenure Commission: 98-000040, 97-000042

On order of the Court, the motion for reconsideration of this Court's order of September 26, 2000, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 27, 2000
I1219

/s/ Ja B. M
Deputy Clerk

ORDER

Michigan Supreme Court
Lansing, Michigan

Entered: September 26, 2000

Elizabeth A. Weaver,
Chief Justice
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
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Justices

GERALD BUSH,
Plaintiff-Appellant,
v
ZEELAND PUBLIC SCHOOLS BOARD OF EDUCATION,
Defendant-Appellee.
SC: 116478, 116560
COA: 223030, 213446
State Tenure Commission: 98-000040, 97-000042

On order of the Court, the petitions for superintending control and applications for leave to appeal from the November 23, 1999 and December 14, 1999 decisions of the Court of Appeals are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 26, 2000
/s/ Jacquline B. MacKinnion
C0919 Deputy Clerk

STATE OF MICHIGAN
COURT OF APPEALS

GERALD BUSH
Plaintiff-Appellant,

UNPUBLISHED
December 14, 1999

v

No. 213446
State Tenure Commission
LC No. 97-000042

ZEELAND PUBLIC SCHOOLS,
Defendant-Appellee.

Before:
Doctoroff, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

Plaintiff appeals from a decision and order of the State Tenure Commission that granted defendant's motion for accelerated judgment and denied plaintiff's motion to "disqualify and disbar" defendant's attorneys. The State Tenure Commission concluded that it lacked jurisdiction because plaintiff's appeal was not timely filed and that it lacked authority to disbar attorneys. We affirm.

We initially note that plaintiff filed a claim of appeal to this Court. However, appeals from a final decision and order of the State Tenure Commission are only by leave. ***Watt v Ann Arbor Bd of Fd***, 234 Mich App 701, 705; 600 NW2d 95 (1999). Therefore, we are without jurisdiction to consider plaintiffs claim of appeal as of right. Nonetheless, to prevent further delay, we treat the claim of appeal as an application for leave to appeal, grant the application, and address the merits of plaintiffs claim. See ***Lindner v Lindner***, 137 Mich App 569, 571 n 1; 358 NW2d 376 (1984).

Our review of findings of the State Tenure Commission is limited to determining whether those findings are supported by competent, material, and substantial evidence. ***Parker v Byron Center Public***

Schools Bd of Ed, 229 Mich App 565, 577-578; 582 NW2d 859 (1998). The commission found that plaintiff did not timely file his appeal. This finding is supported by competent, material, and substantial evidence.

The teacher tenure act, MCL 38.71 et seq.; MSA 15.1971 et seq., provides that a teacher may appeal to the State Tenure Commission any decision of a controlling board, within twenty days of the decision. MCL 38.121; MSA 15.2021. The Zeeland Board of Education adopted a resolution on November 17, 1997, placing plaintiff on leave of absence. The resolution was amended on December 1, 1997, and plaintiff received the amended resolution on December 5, 1997. Plaintiff mailed a claim of appeal on December 24, 1997, but it was not received until December 30, 1997, after the expiration of the twenty-day period. Plaintiff argued that, because he mailed the claim of appeal within twenty days from when he received the resolution, his appeal was timely. However, the commission held that its administrative rules require that an appeal is initiated by filing a claim of appeal with the commission's office. See 1979 AC, R 38.143-145. It is well-settled that a mailing is not a filing. ***Hollis v Zabowski***, 101 Mich App 456, 458- 300 NW2d 597 (1980). Accordingly, the commission property concluded that plaintiff's appeal was not filed until it was received in the commission's office, which was past the twenty-day period. The State Tenure Commission has previously held that the twenty-day period is jurisdictional. ***Almon v Detroit Bd of Ed*** (97-33). Although decisions of the State Tenure Commission are not binding on this Court, we may choose to give them some deference. ***Parker***, ***supra*** at 570. Therefore, the commission properly held that it was without jurisdiction because plaintiff's appeal was not timely filed. (fn 1 Plaintiff also argues that the twenty-day period should have been tolled because he offered the board an amendment to the resolution. However, plaintiff cites no authority for this proposition. "A party may not merely announce a position and leave it to this

Court to discover and rationalize a basis for the claim," ***FMB-First Nat I Bank v Bailey***, 232 Mich App 711, 717; 591 NW2d 676 (1998).)

Because the commission lacked jurisdiction over plaintiffs appeal, it properly denied plaintiff's motion to "disqualify and disbar" defendant's attorneys. Furthermore, 1979 AC, R. 141(l) only requires that attorneys appearing before the commission be in good standing. Nothing in the commission's administrative rules or in the teacher tenure act provides the commission with the authority to disbar attorneys. Rather, our Supreme Court is vested with the authority to regulate attorneys and the practice of law. See MCL 600.904; MSA 27A.904.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

STATE OF MICHIGAN
COURT OF APPEALS

GERALD BUSH
Plaintiff-Appellant,

v

ZEELAND PUBLIC SCHOOLS,
Defendant-Appellee.

No. 213446
State Tenure Commission
LC No. 97-000042

Martin M. Doctoroff,
Presiding Judge,
Peter D. O'Connell
Kurtis T. Wilder,
Judges

The Court orders that plaintiff-appellant's motion for rehearing is DENIED.

/s/ Martin M. Doctoroff

March 2, 2000

/s/ unreadable
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS
Lansing Office

(list of Judges omitted)

May 3, 1999

Mr. Gerald D. Bush
724 E. Central
Zeeland, Mi. 49464

Re: Bush v Zeeland Public Schools
Court of Appeals No. (none given)
Lower Court No. 97-42

Dear Mr. Bush:

The Reply brief which you submitted in this matter is returned to you. The Judges of this Court have directed this office to strictly enforce the provisions of the court rules.

MCR 7.212(G) requires that reply briefs not exceed 10 pages. It appears that the brief does not satisfy the requirements of the court rule.

You may resubmit the reply brief if it is accompanied by five copies of a motion for leave to file a reply brief. See MCR 7.211(A).

Sincerely,

Carl L Gromek
Chief Clerk

by /s/ Peggy Jueckstock

CLG/pj
Enclosure (all briefs returned - added)
cc: Jon G. March
(various addresses of the Court of Appeals omitted)

STATE OF MICHIGAN
STATE TENURE COMMISSION

GERALD BUSH, Appellant,
v Docket No. 97-42
ZEELAND PUBLIC SCHOOLS, Appellee

Attorney for Appellant:
In Pro Per

Attorneys for Appellee:
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ADMINISTRATIVE LAW JUDGE'S
DECISION ON MOTIONS

Appellant filed a motion to disqualify appellee's attorneys from representing appellee in this case. Appellee filed a motion for accelerated judgment, asserting that the Commission does not have jurisdiction in this matter. A hearing on these motions was held on April 23, 1998.

Issue 1 -- Should appellant's motion to disqualify appellee's attorney from representing appellee be granted?

Appellant claims that Jon G. March, Craig A. Mutch and their law firm, Miller, Johnson, Snell & Cummskey, should be "disqualified and disbarred" from representing appellee in this case. Before this case was filed, Mr. March has represented appellee in several cases before the Commission involving appellant. Bush v Zeeland Public Schools (87-30), (92-22) and (93-35). Appellant's motion and brief indicate that Mr. March,

Mr. Mutch and the law firm of Miller, Johnson, Snell & Cummiskey have represented appellee on the appeal of those tenure cases, and other proceedings where Zeeland Public Schools and appellant were the parties. (Appellant's Motion for Disqualification). Mr. Bush claims that the basis for disqualification is that Mr. March and Mr. Mutch have made untruthful statements about the law and the facts of those cases in briefs to the courts and also claims that Mr. March engaged in unethical conduct before the courts and the Commission in other ways. Mr. March responded to appellant's motion by stating that Mr. Bush's factual allegations are without merit, but primarily asserted that the Commission was not the proper forum in which to address those allegations. Mr. March argued that the Commission does not have authority to consider appellant's motion and that appellee has the right to proceed with counsel of its own choosing.

No case law specifically addresses the Commission's authority to rule on a motion such as Mr. Bush's to disqualify appellee's counsel. The Teachers, Tenure Act (Act) provides that the teacher and the controlling board may be represented by legal counsel. MCL 38.104; MSA 5.2004. The Commission's general rules provide that although a teacher may represent himself or herself, a party may be represented by an attorney in good standing. 1979 AC, R 38.141. Thus, neither the Act nor the Commission rules address the issue of disqualification of an attorney. There is, however, a general principle that gives me guidance on this issue. Specifically, administrative agencies, including the Commission, only have the powers given to them by statute. Shiffer v Gibraltar Schools, 45 Mich App 190, 193; 206 NW2d 250 (1973) rev'd on other grounds 393 Mich 190; 224 NW2d 255 (1974). The Legislature has not granted the Commission any power to discipline or disbar attorneys practicing before Commission. Thus, I conclude that the Commission is without authority to entertain appellant's motion. Accordingly, appellant's motion is denied.

Issue 2 -- Should appellee's motion for accelerated judgment be granted?

On November 17, 1997, appellee adopted a resolution which purportedly confirmed that Mr. Bush had been and remained on leave of absence status from his employment with appellee. Appellee amended this resolution on December 1, 1997. On December 2, 1997, appellee notified Mr. Bush of its action and informed appellant of his rights under the Act. Mr. Bush has admitted that he received these documents on December 5, 1997. (See Appellee's motion and attachments). Mr. Bush mailed his claim of appeal to the Commission on December 24, 1997. (See postmark on envelope containing Mr. Bush's claim of appeal). Appellant's claim of appeal was endorsed by the Commission as being received on December 30, 1997. The Commission offices were open on Friday, December 26, 1997, as well as every weekday of the following week, including December 28, 29 and 30, 1997.

Appellee argues that appellant filed his claim of appeal after the appeal period expired. Thus, appellee argues that appellant's appeal is barred. Appellant makes several arguments why the limitation on the appeal period should not be enforced in this case.

The pertinent provision of the Act, MCL 38.121; MSA 15.2021, reads as follows:

"A teacher who has achieved continuing tenure status may appeal to the tenure commission any decision of a controlling board under this act, other than a decision governed by article IV on discharge or demotion of a teacher on continuing tenure, within 20 days from the date of the decision."

Mr. Bush argues that the statute of limitations should be tolled because, after he received the board's resolution, he requested the board to amend or clarify its resolution and it did not. Mr. Bush claims that the appeal period is tolled until the board responds to his request to amend the resolution. The statute does not explicitly make any exceptions to the running of the

appeal period. Moreover, Mr. Bush does not cite any authority for his argument. Therefore, I find that his argument is without merit.

Mr. Bush next argues that enforcement of the Act's statute of limitations creates an injustice, which is contrary to Act's purpose, which is to protect teachers. The flaw in Mr. Bush's argument is that it does not take into account the Commission's obligation to give effect to all of the language of the Act. Canini v Detroit Public Schools (88-2). The Commission cannot enforce some of the provisions of the Act and disregard others. Thus, the Commission must give effect to the language limiting a teacher's right to appeal as well as the language granting a teacher the right to appeal a board decision. The Commission has construed the statute at issue before and has concluded that an appeal filed after the appeal period has expired is barred because the appeal period is jurisdictional. Mullin v Crestwood (84-5). Thus, unless Mr. Bush prevails on his other arguments, appellee's motion for accelerated judgment should be granted.

Mr. Bush argues that a document that is mailed before the statute of limitations expires should be considered to be timely filed. This argument is without merit. The Commission has concluded that mailing does not constitute "filing." Almon v Detroit Public schools (97-33).

Mr. Bush asserts that his claim of appeal was timely mailed and would have been received by the Commission before the appeal period expired if it had been timely delivered. In this regard, appellant offered the testimony of Ms. Bush. Ms. Bush testified that she mailed two envelopes and a written statement (Exhibits 20 and 21) to two acquaintances in Lansing on March 24, 1998, that the acquaintances purportedly recorded the date they received the envelopes on the written statement she had sent them, signed it and mailed it back to Mr. Bush in Zeeland. (Tr Vol 11, pp 87-92). Mr. Bush offered the testimony and the exhibits to show that letters mailed from the Zeeland area to Lansing

usually arrive in Lansing the next day. (Tr Vol 11, p 90). (fn 1 In fact, however, Exhibit 20 shows that it was received by the acquaintance in Lansing the day after it was mailed, and Exhibit 21 shows that it was received in Lansing three days after it was mailed. Ms. Bush testified that she received the envelopes returning the written statements to Mr. Bush the day after the postmark on the envelopes.) However, the critical factor at issue is when did Mr. Bush file his claim of appeal with the Commission, not how long does it usually take for mail to be delivered from the Zeeland area to Lansing. "Filing" has a specific meaning. "A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file." Beebee v Morrell, 76 Mich 114, 120; 42 NW 24 (1889). Here, there is no evidence that Mr. Bush's claim of appeal was filed before December 30, 1997, the date stamped on Mr. Bush's claim of appeal by the Commission.

At the motion hearing, Mr. Bush contended that he would have subpoenaed Eric Bullion, an employee in the mail room at the Department of Education , (Fn2 The Department of Education and the Commission have a common mailing address: P.O. Box 30008; Lansing, Michigan.) but that the subpoenas Mr. Bush received from the Commission on January 28, 1998, were not signed. (Fn 3 At the April 23, 1998 motion hearing I requested Mr. Bush to return the subpoenas he received from the Commission to me. (Tr Vol 11, p 109). I received those subpoenas on April 28 1998, and they were sealed with the Commission seal and unsigned.) Appellant contends that if Eric Bullion would have been subpoenaed to the hearing he would have testified as follows:

"[T]he day after Christmas and around Christmas time, there was very few - he and one other employee work in the mail room, and one of them was absent. But the other thing that is significant is we found out through talking to him as well as others that the mail to the Tenure Commission first goes to the

Lansing post office and then it goes to some outlying distribution center and, from there it comes back to the Tenure Commission building. And then they got to sort it again. And then it goes to the interior of the building. And that - from what we learned, there was vacations being taken at that time and a lot of reasons why the mail could not have gotten sorted and up here in a timely fashion. (Tr Vol II, p 96)."

What Mr. Bush's offer of proof amounts to is that one of the people who worked in the mail room that services the Commission was absent from work on December 26, 1997, the day after Christmas Day. It is noteworthy that Mr. Bullion's proposed testimony would not have established that Mr. Bush's claim of appeal was delivered to the mail room that serves the Commission on December 26, 1997, nor that the mail received at the mail room on December 26, 1997, was not delivered to the Commission offices on that day.

Moreover, the responsibility for Mr. Bush's failure to subpoena Mr. Boullion to the hearing rests with him. The unsigned subpoenas were provided to Mr. Bush on January 28, 1998. (Tr Vol II, p 98). Mr. Bush's possession of the subpoenas this far in advance of the April 23, 1998 hearing allowed him ample time to attempt to serve the subpoenas and correct the Commission's mistake. Mr. Bush does not recall when he first noticed that the subpoenas were not signed, but he stated "[I]t wasn't very long ago that I found they were blank. But I just misplaced them I didn't figure there was time enough to get them out and get some new ones back to get them to anybody." (Tr Vol II, p 98). It seems that he would have noticed the mistake when he attempted to prepare the subpoena to have it served. In fact, Mr. Bush had the subpoenas and talked with Mr. Boullion on January 28, 1998. Mr. Bush could have attempted to serve Mr. Boullion with a subpoena that day. In any event later efforts to serve subpoenas would have required some lead time to allow for the service of the subpoena. But, even having noticed that

the subpoenas were not signed, Mr. Bush made no effort to contact the Commission to obtain proper subpoenas. (Tr Vol 11, p 95) Although Mr. Bush did not make an effort to serve a subpoena on Mr. Bullion or call the Commission to get a proper subpoena, he tried to get Mr. Bullion to respond to mailed correspondence similar to the correspondence in exhibits 20 and 21. (Tr Vol II pp 95-96) It seems that Mr. Bush could have served Mr. Boullion with a subpoena requiring him to testify at the motion hearing as well as sending Mr. Boullion the correspondence described above. Moreover, once Mr. Bush realized that the subpoenas were not signed, he did not request an adjournment of the motion hearing in order to obtain and serve a proper subpoena.

In conclusion, Mr. Bush's arguments are without merit. A claim of appeal is filed with the Commission when it is "delivered and received" by the Commission Almon, supra. Mr. Bush's claim of appeal was received by the Commission on December 30, 1997, after the statute of limitations expired. Accordingly, Mr. Bush's claim of appeal is barred because the Commission does not have jurisdiction to entertain an appeal after the appeal period lapses.

ORDER

IT IS ORDERED that appellant's motion to "disqualify and disbar appellee's attorneys is denied.

IT IS ORDERED that appellee's motion for accelerated judgment is granted and that appellant's claim of appeal is dismissed. Therefore, the hearing scheduled for Thursday May 21, 1998 is canceled.

Dated: May 12, 1993

/s/ James R. Ward
James R. Ward
Administrative Law Judge

STATE OF MICHIGAN
STATE TENURE COMMISSION

GERALD BUSH, Appellant
v Docket No. 97-42
ZEELAND PUBLIC SCHOOLS, Appellee

Attorney for Appellant:
In Pro Per

Attorney for Appellee:
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MILLER, JOHNSON, SNELL AND CUMMISKEY, P.L.C.
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DECISION AND ORDER

BACKGROUND FACTS

On May 12, 1998, Administrative Law Judge James R. Ward issued a Preliminary Decision and order in this case. The Administrative Law Judge granted appellee's motion for accelerated judgment based on appellant's failure to file his appeal with the State Tenure Commission within the 20 day time requirement set forth in MCL 38.121; MSA 15.2021. The Administrative Law Judge also denied appellant's "motion for disqualification and disbarment of Jon G. March; Craig A. Mutch; Miller, Johnson, Snell and Cummiskey, et al, as attorneys for respondent Zeeland Public Schools." The Administrative Law Judge concluded the State Tenure Commission was without authority to entertain appellant's motion because the Legislature has not granted the Commission any power to discipline or disbar attorneys practicing before it. The Preliminary Decision and Order was served on the parties in accord with Article IV, sec 4(5)(i) of the Teachers' Tenure Act. MCL 38.71 et seq; MSA 15.1971 et seq. Appellant filed exceptions to the Preliminary

Decision and Order and appellee filed a statement and brief in support of the Preliminary Decision and Order.

DISCUSSION

Appellee's Motion

We first address appellee's motion for accelerated judgment inasmuch as it involves a question of our jurisdiction to entertain this appeal. On November 17, 1997, appellee's board of education adopted a resolution regarding appellant's leave of absence status with appellee. The resolution, which was amended on December 1, 1997, was mailed to appellant along with copies of the Teachers' Tenure Act, the Master Agreement and notice of appellant's right to appeal the board's action within the 20 day limit set forth in the Tenure Act. Appellant's receipt of the above mentioned items on December 5, 1997, is acknowledged by a certified mail return receipt card and a December 12, 1997 letter of appellant. Appellant mailed his claim of appeal on December 24, 1997; the Commission received it on December 30, 1997. Although the Commission's office was closed on December 25, 1997 (Thursday), it was open on December 26, 29 and 30, 1997. (fn 1 Appellant objects to the lack of background facts and history of this case (this is the fourth tenure appeal filed by appellant against appellee) in the Administrative Law Judge's decision. The facts appellant proposes we consider could be relevant in determining the merits of his appeal; they are not relevant to the determination of whether appellant's claim of appeal was timely, however. We must first determine whether we have jurisdiction to act on appellant's claim of appeal before we address the merits. Similarly, with regard to appellant's motion, we must first determine our authority to entertain appellant's motion before consideration of the merits.)

The Administrative Law Judge held that a claim of appeal is filed with the Commission when it is delivered and received by the Commission. Because appellant's claim of appeal was received after the appeal

period had lapsed, the Administrative Law Judge concluded the Commission lacked jurisdiction to entertain the appeal. Appellant contends the Teachers' Tenure Act does not state that the teacher's appeal must be "filed" within 20 days. Rather, appellant claims that a claim of appeal postmarked on or before the 20th day satisfies the Act's time limits.

The provision of the Tenure Act at issue is Article VI, which states in pertinent part:

"A teacher who has achieved continuing tenure status may appeal to the tenure commission any decision of a controlling board under this act, other than a decision governed by article IV on discharge or demotion of a teacher on continuing tenure, within 20 days from the date of the decision. MCL 38.121; MSA 15.2021."

This section of the amended Tenure Act remains substantially the same as its predecessor contained in the Tenure Act prior to the 1993 amendments. While this provision, standing alone, does not address appellant's specific concern, the Commission's rules as well as its case law construing this section of the Act supply necessary clarification.

Both R 38.143 and R 38.144 indicate that an appeal is initiated by filing with the Commission a notice of appeal and petition. Moreover, R 38.145 states as follows:

"The filing of a document under these rules shall be with the office of the commission, and shall be received by the commission before the close of business on the last day of the time limit, if any, for the filing."

Thus, the Commission's rules specifically establish receipt of an appeal, not postmark date, as a requirement for commencing an appeal before the Commission. Promulgated rules, such as the above, have the full force and effect of law. Goins v Greenfield Jeep Eaale, Inc, 499 Mich 1; 534 NW2d 467 (1995); Clonlara v State Board of Education, 442 Mich 230; 501 NW2d 88 (1993); Blank v Department of Corrections, 222 Mich App 385; 564 NW2d 130 (1997);

Mehrer v Department of Social Services, 24 Mich App 453; 180 NW2d 345 (1970).

Moreover, the Commission's case law likewise establishes that receipt of a claim of appeal by the statutory time limit is a prerequisite to a valid appeal. In Almon v Detroit Public Schools (97-33), this Commission held that a teacher's contention that she mailed a claim of appeal, where there was no record that the claim of appeal was filed with the Commission, did not satisfy the filing requirement of the Tenure Act.

"To "file" requires that a complaint, pleading or document be delivered and received by the agency or court. Mailing simply does not constitute "filing". Hollis v Zabowski, 101 Mich App 456; 300 NW2d 597 (1980); Biafore v Baker, 119 Mich App 667; 326 NW2d 598 (1982). Almon, supra at p 6."

Thus, the Commission's rules as well as its case law make it clear that an appeal must be filed, i.e. received, by the statutory time limit in order to be valid.

Appellant next argues that his appeal was timely because it was filed within the 30 day time limit allowed by R 38.143. (fn 2 The Commission's rules have not been revised since the Tenure Act was amended. The proposed amended rule reflects the 20 day time limit expressed in the statute.) The 20 day time limit of the amended Tenure Act takes priority over the previously promulgated rule, however. This argument has no merit.

Appellant also argues that his tenure rights should not rest upon the "haphazard" state mail system. In support of this argument, appellant offers exhibits 20 and 21 which consist of letters mailed by appellant from the Zeeland area to Lansing. Exhibit 20 was mailed to a private person and arrived the next Exhibit 21 was mailed to a different state office in Lansing and arrived three business days after it was mailed Appellant's claim of appeal arrived in the Commission's office three business days after it was mailed.

We fail to find this evidence supportive of appellant's claim of a "haphazard" state mail system. Appellant's assumption that mail would be delivered to another city the next business particularly during the holiday season, carries with it an element of risk. We do not find a three business day interval "haphazard" for delivery of mail to a large office in another city during the holiday season. Appellant had several alternatives available to him, including mailing his claim of appeal prior to the day before it was due, using an overnight delivery service, or hand delivery. Also, we concur with the Administrative Law Judge's disposition of appellant's offer of proof regarding the proposed testimony of Eric Bullion regarding this issue.

Appellant's final argument with regard to appellee's motion is that it was erroneously granted because appellee failed to prosecute its motion by presenting evidence. Appellee showed appellant received notice of the resolution on December 5, 1997, and that he filed his claim of appeal on December 30, 1997. This evidence fully supports appellee's motion.

Thus, we conclude that appellant's claim of appeal was not timely filed. The 20 day appeal period specified in the Tenure is jurisdictional. An appeal brought after the appeal period has run is barred. Keyes v Wayne-Westland Community Schools (88-20); Todd v Detroit Board of Education (87-13); Rogers v Fenton Area Public Schools (87-2); Mullin v Crestwood School District (84-5). Hence, we must affirm the Administrative Law Judge's granting of appellee's motion for accelerated judgment on this basis.

Appellant's Motion

The above finding regarding appellee's motion is dispositive of appellant's motion, as well. Because we lack jurisdiction to entertain appellant's claim of appeal, we have no authority to consider appellant's motion regarding an issue involving his barred claim of appeal. In the event a reviewing court disagrees with our disposition of appellee's motion, however, we briefly

address appellant's motion. Appellant's motion is "to disqualify Zeeland Schools (sic) present attorneys from further representation in this case and to permanently disbar them from further representation before the Tenure Commission because of their unethical and unprofessional conduct." (Appellant's exception brief pp 5-6; Emphasis Original). (Appellant bases his motion on R 38.141(l) which states in pertinent part:

"Practice before the commission shall be limited to attorneys at law in good standing."

Appellant contends the Commission has the authority to determine if an attorney is in good standing, and to disbar or disqualify attorneys practicing before it citing, inter alia, various United States Supreme Court cases. We find these cases clearly distinguishable as they are based on the inherent authority of courts, which does not apply to administrative agencies such as the State Tenure Commission.

Moreover, even appellant recognizes that this Commission has the authority to interpret its own rules. The deference paid to the interpretive rulings of state agencies has been upheld by the appellate courts of this State.

"The Supreme Court recently reaffirmed its position that the courts should pay some deference to interpretive rulings made by those charged with the duty of executing statutory grants of power.

"'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.'" Board of Education of Oakland Schools v Superintendent of Public Instruction, 401 Mich 37, 41; 257 NW2d 73 (1977), citing United States v Moore, 95 US 760, 763; 24 L Ed 588, 539 (1877).

"We believe this principle should be afforded at least equal, if not greater, weight in the context of administrative interpretations of departmental rules. Golonka v Department of Education, 106 Mich App 28;

308 NW2d 425 (1981). See also, Michigan Education Association v State Board of Education, 163 Mich App 92; 414 NW2d 153 (1987)."

We construe R 38.141(1) to mean that attorneys practicing before the Commission must possess membership in good standing with the State Bar of Michigan. Our interpretation is based on the lack of specific statutory authority for the Commission to disbar or disqualify attorneys practicing before it. Further, neither the statute nor the rules provide any specific criteria upon which to take such action.

In this case, there is no evidence that appellee's attorneys are not members in good standing with the State Bar of Michigan. It is the responsibility of the Attorney Grievance Commission, the Attorney Discipline Board and, ultimately, the Michigan Supreme Court to make that determination. Accordingly, the Administrative Law Judge's denial of appellant's motion must be upheld.

Appellant's References to Violence

Appellee requests that this Commission admonish appellant for his "totally improper argument" where appellee contends "appellant made an implied threat of violence to opposing counsel if his motion was not granted." (Appellee's brief in support of the Preliminary Decision and order, p 13). In appellant's April 23, 1998 reply brief in support of his motion for disqualification and disbarment, he states:

"It is common knowledge that violence often results from injustice. Unjust attorneys are not immune. To prevent violence, courts need to act when they see injustice created and encouraged by unethical attorneys." (Appellant's motion brief, p 8).

These remarks were the subject of a lengthy discussion on record at the April 23, 1998 hearing on motions. (Tr, pp 73-79). Despite a stern admonishment by the Administrative Law Judge, appellant persists in making these remarks in his exceptions brief.

"As these cases clearly illustrate, unethical attorneys win by their lies, deceptions and dirty tricks. The lying attorney has nothing to lose. But teachers do. Teachers, like postal employees, are not immune from committing violence."

"The root of violence is very often the result of injustice. Unethical attorneys create injustice. In order then to prevent injustice and thus prevent violence, it is essential to disbar unethical attorneys." (Appellant's exceptions brief, p 15).

We are strongly concerned about the serious nature of these remarks. We find that they are completely inappropriate. We concur in the Administrative Law Judge's admonishment of appellant for this line of improper and alarming argument.

CONCLUSION

In accord with the above discussion, we find no merit to appellant's exceptions, we adopt the Preliminary Decision and order and we issue the following order.

ORDER

Appellee's Motion for Accelerated Judgment is granted.

Appellant's Motion for Disqualification and Disbarment of Jon G. March; Craig A. Mutch; Miller, Johnson, Snell and Cummiskey, et al, as Attorneys for Respondent Zeeland Public Schools is denied.

/s/ Anne Cruce, Chairperson
/s/ Frances K. Sinelli, Secretary
/s/ Joseph Caimi, Member,
/s/ Judy Emmons, Member
/s/ Louis A. Smith, Member DATED: July 9, 1998

IN THE MICHIGAN
COURT OF APPEALS
ORDER

Re: GERALD BUSH v ZEELAND PUBLIC SCHOOLS
Docket No. 223030
[STCommission] LC No. 98-000040

Richard A. Bandstra, Chief Judge, acting under MCR 7.203(F)(1) and MCR 7.216(A)(10), orders:

The claim of appeal is DISMISSED for lack of jurisdiction because the order from the State Tenure Commission is not appealable as a matter of right. See Watt v Ann Arbor Board of Education, 234 Mich App 701 (1999).

/s/ R. Bandstra

A true copy entered and certified by Carl L.Gromek, Chief Clerk, on November 23, 1999.

/s/ Carl L. Gromek

Date: Nov. 23, 1999 Chief Clerk

COURT OF APPEALS, STATE OF MICHIGAN
ORDER

GERALD BUSH v ZEELAND PUBLIC SCHOOLS
Docket No. 223030
[STCommission] LC No. 98-000040

Janet T. Neff
Presiding Judge
Michael J. Kelly
David H. Sawyer
Judges

The Court orders that the motion for rehearing is DENIED.

/s/ Janet T. Neff, Presiding Judge

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on February 16, 2000. /s/ Carl L. Gromek

Date: Feb. 16, 2000 Chief Clerk

STATE OF MICHIGAN
TEACHER TENURE COMMISSION

GERALD BUSH,
Appellant

v Docket No. 98-40

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Appellee
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PRELIMINARY DECISION AND ORDER
OF ADMINISTRATIVE LAW JUDGE

BACKGROUND FACTS

Appellant Gerald Bush is tenured with the Zeeland Public schools. He initially went on sick leave in 1993. Subsequent to the sick leave, appellant went on a short-term disability leave which was followed by a long-term disability leave lasting for two years. Appellant then filed for workers, disability compensation benefits. The insurance carrier contested the matter and the trial was spread over several years. Ultimately, a workers' disability compensation judge ruled that appellant was not disabled and the matter is now on appeal. (Tr Vol IV, pp 56-62).

On November 17, 1997, the Zeeland Board of Education passed a resolution which was amended on December 1, 1997, to put appellant on leave of absence

status through June 30, 1998. (Exhibit 1). Appellant appealed the board's action to the State Tenure Commission. Appellant's claim of appeal was dismissed as untimely. (STC 97-12). On December 2, 1997, Mr. Gary Feenstra, superintendent of the Zeeland Public Schools, wrote to appellant asking him to inform the superintendent, by April 1, 1998, of his plans for the 1998-99 school year (Exhibit 2) Appellant did not respond to the letter. (Tr Vol IV, p 63) On October 19, 1998, the board resolved that appellant had abandoned his teaching position. (Exhibit 12)

On November 9, 1998, appellant filed a claim of appeal contesting the board's resolution that he had abandoned his teaching position. Appellant's claim of appeal was deficient in that it did not comply with the Commission Rules. Appellant was instructed to resubmit his claim of appeal, which he did. Appellant did not file a response to the prehearing questionnaires as instructed by the administrative law judge. At a prehearing conference, the parties were instructed to exchange documents and witness lists ten days prior to the hearing date Appellant did not comply. Appellee filed a Motion for Accelerated Judgment to dismiss appellant's appeal. The motion was denied. On January 27, 28, 29, 1998 the administrative judge held a hearing in this case.

FINDINGS OF FACT

Appellant had been on disability since 1993. After a contested hearing, a workers, disability compensation judge, determined that appellant was not disabled. Appellant filed an appeal from that decision. (Tr Vol IV, pp 56-62). By a letter dated December 2, 1997, Mr. Feenstra asked appellant to inform him, by April 1, 1998, of his plans for the 1998-99 school year. (Exhibit 2). Appellant acknowledged receiving the letter, but did not respond. (Tr Vol IV, pp 62-63).

Again, Mr. Feenstra, in a letter to appellant dated June 4, 1998, inquired about appellant's intentions for the 1998-99 school year. The letter further stated that

unless Mr. Feenstra heard from appellant, Mr. Feenstra would assume that appellant would report for teaching in the 1998-99 school year. Despite having received the letter, appellant did not respond. (Exhibit 3; Tr Vol IV, p 65). On August 5, 1998, Mr. Feenstra instructed appellant to report to school on August 24, 1998. The letter also included his teaching assignment for the 1998-99 school year. The teaching assignment consisted of two classes of beginning woods, one beginning metal and two team teaching classes Mr. Feenstra testified that appellant was certified in the subjects he was assigned to teach. However, before appellant would be allowed to return to work, Mr. Feenstra required appellant to undergo psychological evaluation to assess whether he posed a risk of workplace violence. In response to why he took such an action, Mr. Feenstra responded that appellant had talked about workplace violence, and had displayed extreme anger toward Assistant Superintendent Michael Jones and Mr. Jay Klinge, the assistant principal at the high school. Also, in some of his legal briefs appellant had written that he had entertained thoughts of killing Mr. Jones with a gun. He had placed his anger toward Mr. Jones at a 10, on a scale of 1 to 10, with 10 being the most severe. Mr. Feenstra testified that after reading appellant's statements in his briefs, about being "tempted to commit some violence to gain revenge", being "trapped in a corner", of "homicide being the leading cause of workplace fatalities", writing about "going postal", about "unjust attorneys not being immune from violence", "teachers, like postal employees, are not immune from committing violence,"and using the "11th avenue relief" which is "evening the score", all of these individually and collectively, created a concern for the safety of his employees and the possibility that appellant posed a risk of workplace violence. This concern is heightened because the central office, where Mr. Feenstra and Mr. Jones worked, is located inside an elementary school. (Tr Vol I, pp 114-117; Tr Vol 11, pp 77-105).

On August 5, 1998, Mr. Feenstra wrote a letter to Dr. Scott Stehouwer and requested that Dr. Stehouwer conduct an independent evaluation on appellant's risk of workplace violence. Dr. Stehouwer is a board-certified psychologist with a Ph.D. from Wayne State University. He is a professor of psychology at Calvin College and is the author of several articles in professional journals. Dr. Stehouwer is also an independent practitioner in comprehensive psychological services. (Exhibit 26) In his letter to Dr. Stehouwer, Mr. Feenstra enclosed excerpts of appellant's briefs dealing with workplace violence to provide context. (Exhibit 6; Tr Vol I, p 120). Mr. Feenstra directed appellant to submit to the evaluation and provided him two alternative dates. (Id. p 139). Although appellant met with Stehouwer, appellant refused to take the evaluative tests. (Exhibit 9). Again, Mr. Feenstra instructed appellant to submit to the evaluative tests no later than September 5, 1998. Appellant was put on notice that failure to submit to the psychological examination would constitute abandonment of his teaching position. Appellant did not take the assessment tests (Tr Vol 1, pp 145-148; Exhibit 10). On October 19, 1998, the board passed a resolution determining that appellant, through his refusal to take the evaluative tests, had abandoned his teaching position. (Exhibit 12). Appellant was notified of the board's resolution. (Exhibit 13)

Dr. Stehouwer testified that had appellant agreed to take evaluative tests, Dr. Stehouwer would have administered the Minnesota Multi-phasic Personality Inventory (MMPI-III) and the Millan Clinical Multi-axial Inventory (MCMI-III) tests. The Roman numeral III stood for the third edition in both tests. Dr. Stehouwer testified that the tests are objective and probe emotional problems such as paranoia and suspiciousness, including the kind of problems that might be associated with violence. The tests do not require interpretation by the administrator, and have validity scales, according to Dr. Stehouwer, which

indicate whether the person tested is honest and straightforward in responding or whether the person is faking or exaggerating symptoms. Dr. Stehouwer further testified that he explained all of that to appellant in the only face-to-face discussion that he had with appellant. (Tr Vol II, pp 11-15). Dr. Stehouwer, after reviewing exhibits 15, 18, 21 - 24, which were excerpts of briefs or transcripts in appellant's various litigations testified that, based on a review of the documents, Mr. Feenstra's request to have appellant evaluated for potential threat of workplace violence was reasonable. (Id. p 17).

Appellant testified that appellee had not granted him leave of absence at any time. He was initially on sick leave, then a short-term disability leave followed by long-term disability leave. Appellant filed for workers's disability benefits for what he described as stress, harassment and discrimination on the job. Subsequently, the issue of his workers, disability benefits was heard before an administrative law judge. Appellant was judged to be not disabled and he has appealed the decision. On December 2, 1997, Mr. Feenstra wrote to appellant informing him that his leave of absence status since August 1993 has been confirmed and ratified by the appellee board. The letter informed appellant that his insurance coverage was extended through January 31, 1998. The letter also informed appellant that he would remain on leave of absence through June 30, 1998. Appellant disputed his leave of absence status by filing a claim of appeal with the State Tenure Commission. He testified that he was on disability status at the time the board, on November 17, 1997, passed its resolution "confirming" that appellant was on leave of absence. Appellant testified that the board's resolution putting him on leave of absence status was a subterfuge when, in reality, he was on disability leave. (Tr IV, pp 21-30).

With respect to the psychological evaluation by Dr. Stehouwer, appellant testified that he was not bound under the law or the Constitution to be

evaluated. Also, after talking to Dr. Stehouwer, he realized that Mr. Feenstra had already provided him with excerpts from transcripts and briefs in his various litigation with appellee and he felt that Dr Stehouwer was prejudiced by the excerpts and that "nothing good would come out of the evaluation". (Id. pp 36-37). Appellant declined to be evaluated, after which appellant received a notice that if he did not get evaluated by the psychologist as instructed, he would be deemed to have abandoned his employment with the Zeeland Public Schools. Appellant testified that he did not abandon his position. Rather, he felt that he was still seeking workers' compensation benefit for stress, harassment and depression as a result of his interaction with the Zeeland Public Schools. (Tr Vol IV, pp 36-38). Appellant also objected to the introduction of his briefs and transcripts to support appellee's allegations that he posed a risk of workplace violence on the ground that his "speech' was protected under the First Amendment.

Appellant testified that his reference to workplace violence was to get the courts and the administrative agencies, who conducted his hearings, to consider the law and the arguments contained in his briefs and testimony. Those statements were merely intended to suggest possible theoretical outcomes and were not meant to threaten workplace violence. Appellant testified that he would not have endured 20 years of "harassment" and pursued litigation with the board had he had a mind to commit workplace violence. (Tr Vol IV, p 85; Tr Vol III, p 70).

On cross-examination, appellant acknowledged that he had received Mr. Feenstra's April 1, 1998 letter inquiring what appellant's plans were for the 1998-99 school year. He also acknowledged that he did not respond to the letter. Appellant also conceded that he did not respond to Mr. Feenstra's letter informing him that unless the superintend-ent heard otherwise, he would assume that appellant would be returning back to school. Appellant also acknowledged receiving the fall

teaching assignment. Appellant testified that he understood that the psychological test was a condition precedent to his return to a teaching job. Appellant further conceded that he understood that appellee would deem his refusal to undertake a psychological evaluation an abandonment of his employment. Appellant admitted that he was invited to submit a written statement about the question of abandonment, but, nevertheless, decided not to provide input about the subject matter to the board. Appellant acknowledged receiving the board's resolution that it had deemed appellant to have abandoned his employment with the board. Appellant acknowledged that the excerpts admitted as Exhibits 16, 18, 19, 21, 22 and 24 were from his briefs or transcripts filed with either the applicable administrative tribunals or the courts. (Tr Vol IV, pp 62-76).

On further cross-examination, appellant testified Zeeland Public Schools had done him an injustice and that Mr. Jones was primarily responsible for this perceived injustice. In addition, appellant testified that Mr. Klinge and Mr. Ken Harper, a union official, were partly responsible for the injustice appellant had suffered. Appellant admitted that these individuals were present and past employees of the Zeeland Public Schools and a union official associated with Zeeland Public Schools. Appellant testified that he harbored resentment and anger toward these people including Mr. Feenstra. Also, appellant testified that, as long as Mr. Jones was his supervisor, there was no way he could return back to work. Appellant testified that Mr. Jones, as assistant superintendent for human resources, would have the power to assign, reassign him and "whipsaw, him if he decided to come back to work. In support of this position, appellant testified that in the 1993-94 school year, Mr. Jones had appellant transferred from middle school to high school in order to have appellant under his control and power. In the past, appellant testified that he had attempted to transfer away from Mr. Jones to no avail. Appellant

testified that Mr. Jones would not leave him alone. Appellant further testified that Mr. Jones is very powerful and that no one would stop him. (Tr Vol IV, pp 100-108)

ISSUES

1. Was it reasonable to require appellant to undergo psychological examination before allowing him to return to a teaching position?

2. Does appellee have the authority to require appellant to undergo psychological evaluation?

3. Did appellant abandon his employment with the Zeeland Public Schools?

4. Did appellee perpetrate subterfuge against appellant in determining that appellant had abandoned his teaching position?

CONCLUSIONS OF LAW

Appellee has the burden of proving, by the preponderance of the evidence, that it was reasonable to require appellant to undergo psychological assessment before allowing him to return to a teaching position. Appellee has the further burden of proving that it had the authority to require appellant to undergo a psychological evaluation. Appellee must also prove that appellant abandoned his employment with the Zeeland Public Schools. Herman v Board of Education of the West Bloomfield School District (83-16).

Where subterfuge is alleged, the party asserting it has the burden of proof. Purcell v Ferndale School District (76 -56). In the instant case, appellant bears that burden.

Issue 1 -- Was it reasonable to require appellant to undergo psychological assessment before allowing him to return to a teaching position?

The issue here is not whether appellant posed a risk of workplace violence; it is whether, given the totality of appellant's utterances, statements and briefs, it was reasonable for appellee to inquire into appellant's

potential for resorting to workplace violence. I find that such an inquiry was reasonable. Despite appellant's assertions that his many references to workplace violence were intended to get the courts and administrative tribunals, attention, it was reasonable for the superintendent to have taken these assertions as threats.

Appellant's intense anger at Mr. Jones, as shown by appellant's testimony, his many writings, his demeanor, his pronouncement that he had thought of killing Mr. Jones, his anger toward Mr. Harper and Mr. Klinge, though less intense, would be matters of concern to any administrator. Because of his perception that he has been treated unjustly by the legal system, in particular, his perception that few of his cases were decided on their merits - most were disposed through motions or procedurally decided based upon appellant's untimely filing of essential documents - his bitterness at these results and his numerous references to workplace violence would lead a reasonable person to conclude that appellant might pose such a risk. Appellant felt these dispositive motions or procedural decisions were defective because they did not go into the merits of his case. Appellant could not acknowledge that such decisions were as valid as decisions on the merits of a case. Therefore, despite appellant's lengthy record of pursuing redress through legitimate means, his briefs, which contained references to "street justice", "going postal", "attorneys and administrators are not immune from violence" or pointing to the incident at Oklahoma City as what might happen when justice is thwarted, give a sound basis for requiring some assurance that appellant would not resort to violence.

Appellant alleged in his brief that the free speech he exercised in all legal proceedings is protected speech and should not be used against him to prove abandonment. According to appellant, appellee's use of his speech to establish abandonment was, therefore, null and void. Undoubtedly, appellant is free to exercise his First Amendment rights. However, free speech does

not protect him from the consequences of his action or the inferences that might he drawn from his speech. Appellant was alleging that he was prohibited from speaking or writing. His objection was that appellee had made inferences from his speech which appellant found objectionable because the inferences supported appellee's contention. Such objection is without merit.

For these reasons, it is quite reasonable for the superintendent to require appellant to undergo psychological evaluation.

Issue 2 -- Does appellee have the authority to require appellant to undergo a psychological evaluation?

In Sullivan v Board of Education of the River Valley School District (95-25), the controlling board required a teacher submit to physical and psychological examination because of the teacher's series of insubordination and disruption of the controlling board's meetings. The teacher refused to submit to examination by a designated doctor and instead he was examined by his own doctor. The teacher provided to the controlling board his doctor's report. Appellant was charged, among other things, with insubordination. The Commission upheld the right of a controlling board to require physical and medical examination when it is reasonable and not arbitrarily applied. The Commission further held that appellant's submission of his doctor's report to the controlling board did not constitute compliance with the board's directive. The Commission in Aslin v Board of Education of the Birch Run Area Schools (82-85) and Barrow v Portage Public Schools (93-38) ruled that a school district has the right to require medical verification of fitness before a teacher could be placed in a teaching position following a medical leave of absence.

Therefore, based on Sullivan, Aslin and Barrow, appellee has the authority to require appellant to submit to psychological examination.

Issue 3 -- Did appellant abandon his teaching position with the Zeeland Public Schools?

Appellant argued in his brief that the abandonment doctrine is "an out of wedlock child born of case law (therefore, it) should be scrutinized with critical eye and a disbelieving mind by the fact finder." In Tomiak v Hamtramck School, 426 Mich 678 (1986), the Court adapted a circuit court's reasoning about the relevance of the abandonment doctrine. It stated:

"Clearly, the abandonment doctrine cannot be employed against a tenured teacher who manifests every intention of continuing on the job. But it is equally clear that a local board must have some legal mechanism with which to treat those employees who for whatever reason, refuse to work and refuse to verbalize a resignation. The abandonment doctrine provides that tool. It has been accepted and affirmed in several Michigan cases. (Citation omitted.) It is an established legal principal in Michigan. Tomiak, supra at 692."

The abandonment doctrine is sanctioned by the courts and is applicable to this case.

In Purcell, supra, the Commission ruled that for an action to constitute abandonment two elements have to be present: (1) an overt act or failure to act by the party coupled with, (2) an intent to totally and absolutely relinquish the position. I have found appellee's request that appellant submit to a psychological examination reasonable. In view of this finding, appellant's refusal, despite repeated requests by the superintendent, to submit to the examination and his failure to inform the superintendent of his intentions for the 1998-99 school year satisfy the first element of the theory of abandonment.

Next, I look to see if appellant demonstrated an intent to totally and absolutely relinquish his position. Appellant's refusal to submit to psychological evaluation, after he was repeatedly informed that his refusal would be deemed abandonment; appellant's failure to communicate his intention for the fall

semester of the 1998-99 school year, after he was instructed to express his intention and his inaction when informed of his right to appear or to submit a written statement rebutting the superintendent's abandonment recommendation to the board establish an intent to abandon his position.

In Cunningham v Board of Education of the School District of Bloomfield Hills (79-28) and Miner v Board of Education of the School District of Bloomfield Hills (79-27); aff'd 113 Mich App 388; 317 NW 638 (1982), appellants were given leave of absence. Pursuant to the collective agreement between the parties, appellants were required to notify the school district no later than April 1, 1979, of their intentions to return to work for the coming school year. The contract provided that failure to timely notify the district of their intention to return or seek a timely extension of their leave would constitute a voluntary resignation. Neither teacher notified the district of her intent to return by the due date. The board acted to accept appellants resignation and the appellants filed separate petitions against the board's action.

The Commission in the above consolidated case rejected the board's decision and held that "...neither the form letter issued by Appellee when a teacher is granted a leave of absence, nor the contractual language pertaining to the sanction for failure to provide notice, were sufficiently explicit to have forewarned Appellants of the irretrievably final conclusion Appellee Board would draw from their inaction." p 10. Rather, the Commission looked at the appellants actions, after they had received the Board's decision, to determine whether there was intent to resign.

Appellant's refusals to act seen individually do not constitute abandonment. However, his conduct seen in totality, including his refusal to submit to psychological evaluation, his unwillingness to state his intent about the fall semester when he was repeatedly instructed to do so, his statement that he would be

reluctant to return to work, as long as Mr. Jones and, to the lesser degree, Mr. Feenstra and Mr. Klinge had supervisory role over him, and his pursuit of his disability claim despite having been found to be not disabled, all demonstrate that appellant has no intention of returning to work.

Appellant's failure to comply with the district's various directives can be better understood if seen in light of appellant's workers' compensation claim. Appellant found himself in a difficult predicament having to choose between his workers disability compensation claim and returning back to work. Either choice would mean forfeiting one of his rights. Having been found not disabled by a workers disability compensation judge and having appealed that decision, returning back to work would have undermined his claim of disability. Refusal to return to work could subject him to abandonment and thus lead to discharge. Appellant chose to maintain his disability claim appellant chose to pursue his disability claim. The fact that in spite of his recall to a teaching position, means that, if he prevails in his appeal, he would be paid disability benefits from the time of disability claim and the issue of returning back to work would be moot. However, it would be unreasonable for appellee to wait the outcome of the disability benefit appeal before it took any action.

Appellee has borne its burden of proving that appellant abandoned his teaching position.

Issue 4 -- Did appellee perpetrate subterfuge against appellant in determining that appellant had abandoned his teaching position?

Appellant contended that appellee's reliance on the theory of "abandonment" was merely a ruse to discharge an employee who has been a thorn at its side. Appellant claims this administrative law judge prohibited him from proving this theory of "subterfuge" by disallowing proof of discrimination, harassment and

years of injustice. Appellant has litigated his claims of discrimination, harassment and his perceived injustices in various forums during the years. (Exhibits 16, 18, 19, 21, 22 and 24). While the administrative law judge did indeed exclude evidence which was previously litigated, he did not prevent appellant from submitting evidence of these issues in support of his "subterfuge" theory for the period post-dating the resolution of his various lawsuits with the courts and administrative agencies. Instead appellant was intent on relying on the same theories of retaliation, harassment and injustice, all of which were litigated, including his theory of subterfuge, to prove subterfuge in the instant case.

Appellant puts premium on the board's resolution to place him on unrequested leave of absence. Appellant alleged that putting him on leave of absence was subterfuge, presumably to alter his status from disability to a status where appellee could place him into a teaching position. In Jakub v Detroit Board of Education [77-43-R), the Commission considered the interplay between the teacher's workers', compensation claim and his right under the Tenure Act. It held that the leave which results from a workers' compensation claim may be viewed as a voluntary leave of absence. A teacher on such a leave of absence has a right to return to active duty once the condition which gave rise to leave is found to be no longer present or was nonexistent. The same logic would also empower a school board to recall a teacher to active duty once the leave period is over.

In the instant case, appellant was declared to have no disability. Appellee continued appellant on an unrequested leave of absence for the remainder of the school year and recalled him to active duty. Appellant's argument that putting him on an unrequested leave of absence, after he was found to be not disabled, was a subterfuge has no merit. Appellee has a right to place a teacher on an unrequested leave of absence. The teacher that is so placed has a right to a hearing on the unrequested leave of absence pursuant to Article 4,

Section 2 of the Act MCL 38.112; MSA 15.2012; Rogers v Board of Education of the Trenton Public Schools, 61 Mich App 682; 233 NW2d 141 (1975). Appellant was provided such a hearing.

Appellant did not carry the burden of proof that appellee engaged in subterfuge. Therefore, I find that appellee did not engage in subterfuge in either placing appellant on an unrequested leave or determining that appellant had abandoned his teaching position.

Appellant claimed in his brief that he had an absolute right to avoid Mr. Jones and in so doing avoid being put in a discriminatory situation or a situation leading to harassment. Appellant's prior lawsuits on these same issues were either decided against appellant or are on appeal by appellant. There is no record that Mr. Jones ever discriminated or harassed or any proof that Mr. Jones would engage in these acts in the future. Appellant's claim that he has a right to avoid Mr. Jones or any supervisor is, therefore, without merit.

CONCLUSION

Based on the evidence presented and after a review of the parties' briefs, I find that appellee's requirement that appellant undergo psychological evaluation is reasonable. Appellee has the authority to require appellant to undergo the evaluation. Appellant's refusal to undergo the psychological evaluation coupled with his various failures to act, are grounds to find that appellant had abandoned his teaching position. Finally, I find that appellee did not engage in subterfuge either in putting appellant on an unrequested leave of absence or in resolving that he had abandoned his teaching position.

ORDER

IT IS HEREBY ORDERED that appellant's claim of appeal is denied.

DATED: May 24, 1999

/s/ Tessema Berga
Administrative Law Judge

STATE OF MICHIGAN
STATE TENURE COMMISSION

GERALD BUSH, Appellant

v Docket No 98-40

BOARD OF EDUCATION OF ZEELAND PUBLIC SCHOOLS,
Appellee

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APPELLANT'S MOTION TO EXTEND TIME TO FILE EXCEPTIONS

BACKGROUND FACTS

On May 24, 1999, Administrative Law Judge Tessema Berga issued a Preliminary Decision and Order denying appellant's claim of appeal. The cover letter accompanying the Preliminary Decision and order stated that exceptions had to be received in the Commission's office by June 14, 1999, to be timely. On June 14, 1999, appellant faxed to the Commission's office the instant motion seeking to extend the time for filing exceptions. On June 15, 1999, appellee filed its response and objection to appellant's motion. (fn 1 On June 14, 1999, appellee filed its own exceptions which were expressly made contingent upon appellant filing a timely exceptions. On June 14, 1999, appellee filed a

written withdrawal of its exceptions because appellant had not filed timely exceptions.)

DISCUSSION

Article IV, sec 4(5)(j) of the Teachers' Tenure Act states as follows:

"(j) Not later than 20 days after service of the preliminary decision and order, a party may file with the tenure commission a statement of exceptions to the preliminary decision and order or to any part of the record or proceedings, including, but not limited to, rulings on motions or objections, along with a written brief in support of the exceptions. The party shall serve a copy of the statement of exceptions and brief upon each of the other parties within the time limit for filing the exceptions and brief. If there are no exceptions timely filed, the preliminary decision and order becomes the tenure commission's final decision and order." MCL 38.104(5)(j); MSA 15.2004 (5)(j).

The controlling statute set forth above provides no exception to the 20-day timeline for filing exceptions. The Commission has consistently refused to entertain exceptions filed beyond the 20-day deadline, noting that it is required to strictly enforce timelines mandated by statute. Hoose v Board of Education of the Lapeer Community Schools (94-14); McGaghie v Board of Education of the Parchment Public Schools (97-28); Lester v Detroit Board of Education (95-38); Torrento v Board of Education of the Detroit Public Schools (98-6). In a previous case filed by appellant against appellee, appellant sought an extension to file a motion for rehearing beyond the time specified by statute. We denied the motion, stating that neither this Commission nor the parties could extend the time limitation fixed by a statute. Bush v Zeeland Public Schools Board of Education (93-35-R). Similarly, in this

case, we are without authority to extend the timeline designated by the Legislature in the Tenure Act.

Thus, appellant's motion to extend the time for filing his exceptions must be denied. In order to be timely, appellant's exceptions had to have been received in the Commission's office by June 14, 1999. Because appellant did not file timely exceptions, the Preliminary Decision and Order has become this Commission's final decision and order in this matter MCL 38.104(5)(j); MSA 15.2004(5)(j).

ORDER

Appellant's motion to extend the time to file exceptions is denied.

Anne Cruce, Chairperson DATED: June 21, 1999

STATE OF MICHIGAN
STATE TENURE COMMISSION

GERALD BUSH, Appellant

v Docket No. 98-40-2

BOARD OF EDUCATION OF ZEELAND PUBLIC SCHOOLS, Appellee

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APPELLANT'S MOTION FOR REHEARING
BACKGROUND FACTS

On May 24, 1999, Administrative Law Judge Tessema Berga issued a Preliminary Decision and Order denying appellant's claim of appeal. The cover letter accompanying the Preliminary Decision and Order stated that exceptions had to be received in the Commission's office by June 14, 1999, to be timely. On June 14, 1999, appellant faxed to the Commission's office a motion seeking to extend the time for filing exceptions. The chairperson of the State Tenure Commission issued a decision and order on June 21, 1999, denying appellant's motion. Appellant filed the instant motion for rehearing of that decision on August 19, 1999. Appellee filed its response and objection to appellant's rehearing motion on August 24, 1999.

ISSUE Should appellant's motion for rehearing be granted?

DISCUSSION

Appellant first contends that the decision by the State Tenure Commission chairperson exceeds her authority and, therefore, is null and void. As appellee points out, Rule 26 of General Administration Rules of Practice and Procedure of the State Tenure Commission provides that "[a]djournment or continuance shall not be granted except for good cause shown to the chairperson or designated member of the commission." Further, Rule 48 states that "[t]he chairperson of the commission shall have the power to: . . . [d]ispose of procedural requests or similar matters."

Promulgated rules, such as the above, have the full force and effect of law. Bush v Zeeland Public Schools (97-14) (sic 97-42) (7/9/98); Clonlara, Inc. v State Bd of Ed, 442 Mich 230; 501 NW2d (1997). These rules clearly establish the authority of the chairperson to issue the order in question. Thus, appellant's argument is rejected.

Furthermore, we agree with and adopt in full the reasoning set forth in the chairperson's decision. For the convenience of the reader, the discussion portion of the chairperson's decision is reproduced below.

"Article IV, sec 4(5)(j) of the Teachers' Tenure Act states as follows:

"(j) Not later than 20 days after service of the preliminary decision and order, a party may file with the tenure commission a statement of exceptions to the preliminary decision and order or to any part of the record or proceedings, including, but not limited to, rulings on motions or objections, along with a written brief in support of the exceptions. The party shall serve a copy of the statement of exceptions and brief upon each of the other parties within the time limit for filing the exceptions and brief. If there are no exceptions timely filed, the preliminary decision and order becomes the tenure commission's final decision and order. MCL 38.104(5)(j); MSA 15.2004 (5)(j)."

"The controlling statute set forth above provides no exception to the 20-day timeline for filing exceptions.

The Commission has consistently refused to entertain exceptions filed beyond the 20-day deadline, noting that it is required to strictly enforce timelines mandated by statute. Hoose v Board of Education of the Lapeer Community Schools (94-14); McGaghie v Board of Education of the Parchment Public Schools (97-28); Lester v Detroit Board of Education (95-38); Torrento v Board of Ed. of the Detroit Public Schools (98-6).

"In a previous case filed by appellant against appellee, appellant sought an extension to file a motion for rehearing beyond the time specified by statute. We denied the motion, stating that neither this Commis -sion nor the parties could extend the time limitation fixed by a statute. Bush v Zeeland Public Schools Board of Education (93-35-R). Similarly, in this case, we are without authority to extend the timeline designated by the Legislature in the Tenure Act.

"Thus, appellant's motion to extend the time for filing his exceptions must be denied. In order to be timely, appellant's exceptions had to have been received in the Commission's office by June 14, 1999. Because appellant did not file timely exceptions, the Preliminary Decision and Order has become this Commission's final decision and order in this matter. MCL 38.104(5)(i); MSA 15.2004(5)(j). [Bush v Zeeland Public Schools (98-40)]"

In his brief in support of rehearing of the above decision, appellant raises several arguments. We shall discuss them briefly because they clearly lack merit. Appellant contends, citing Smith v Lansing School District, 428 Mich 248; 406 NW2d 825 (1987), that "the decision of the chairperson is procedurally faulty because it prevented oral and written arguments prior to the decision to dismiss." Appellant was afforded a full due process hearing on the merits before the ALJ denied his claim of appeal. Thus, Smith v Lansing School District, supra, was fully satisfied. There is no requirement for further oral argument on a procedural motion to extend the time for filing exceptions.

Appellant next claims that the chairperson erred in construing the statute. Appellant's own citation states that a fundamental principle of statutory construction is that a clear and unambiguous statute leaves no room for interpretation. People v Plumsted, 2 Mich 465, 469 (1853). The statute in question states clearly and unambiguously that exceptions are to be filed "not later than 20 days" after service of the Preliminary Decision and Order. Hence, there is no basis for interpretation of this provision.

Appellant further contends, citing various authorities, that the timeline should be viewed only as a "guideline", and that courts have held that cases should not be dismissed unless there is a statutory provision to do so. We find that the cases appellant cites are not applicable to this case. Moreover, the Tenure Act contains a provision supporting the action taken by the chairperson. Article IV, sec 4(5)(j) states if no exceptions are timely filed, the Preliminary Decision and Order becomes Commission's final decision and order, as occurred here.

Finally, appellant complains that the legislatively set timeline is too short, and that it violates state policy as well as his due process rights. As appellee notes, it is an established principle of law that an action to enforce a statutory right is restricted to the time limit set forth in statute. Finkelstein v Department of Revenue, 312 Mich 186, 20 NW2d 154 (1945). This Commission lacks authority to alter statutory timeliness. Appellant's recourse lies within the legislative forum.

For the above reasons, we find no merit in appellant's arguments. Accordingly, we affirm and adopt the decision of chairperson. Appellant's motion for rehearing is denied.

ORDER

Appellant's motion for rehearing is denied. /s/Anne Cruce, Chairperson; /s/Frances K. Sinelli, Secretary; /s/Joseph Caimi, Member; /s/James Cameron, Jr., Member;Not Participating: Judy Emmons
DATED: September 29, 1999

[WORKER'S COMPENSATION DECISIONS]

Order

116894 (23) Entered: February 26, 2001
Michigan Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

GERALD D. BUSH, Plaintiff-Appellant,
and MESSA, Intervening-Plaintiff,
v
ZEELAND PUBLIC SCHOOLS,
and CITIZENS INSURANCE COMPANY OF AMERICA,
Defendants-Appellees
SC: 116894
COA: 221108
WCAC: 97-0586

On order of the Court, the motion for reconsideration of this Court's order of November 29, 2000, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 26, 2001

/s/ Corbin R. Davis
Clerk

I0220

Order

116894
Michigan Supreme Court
Lansing, Michigan

Entered: November 29, 2000

Elizabeth A. Weaver
Chief Justice
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan,
Robert P. Young, Jr.
Stephen J. Markman,
Justices

GERALD D. BUSH, Plaintiff-Appellant,
and MESSA, Intervening-Plaintiff,
v
ZEELAND PUBLIC SCHOOLS, and
CITIZENS INSURANCE COMPANY OF AMERICA,
Defendants-Appellees
SC: 116894
COA: 221108
WCAC: 97-0586

On order of the Court, the application for leave to appeal from the April 28, 2000 decision of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 29, 2000
/s/ Corbin R. Davis
K1121 Clerk

Court of Appeals, State of Michigan

ORDER

Gerald D. Bush v Zeeland Public Schools

Docket No. 221108
LC No. 97-000586

Michael R. Smolenski,
Presiding Judge
Richard A. Bandstra
David H. Sawyer,
Judges

The Court orders that the application for leave to appeal be DENIED for lack of merit in the grounds presented.

/s/ Michael R. Smolenski
Presiding Judge

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on:

Date: 4-28-00

/s/ Carl L. Gromek
Chief Clerk

1999 ACO #343

STATE OF MICHIGAN
WORKER'S COMPENSATION APPELLATE
COMMISSION

GERALD D. BUSH, PLAINTIFF
AND MESSA, INTERVENING PLAINTIFF,
v DOCKET # 97-0586

ZEELAND PUBLIC SCHOOLS AND CITIZENS
INSURANCE COMPANY, DEFENDANTS.

APPEAL FROM MAGISTRATE ANDERSON

JOHN A. BRADEN FOR PLAINTIFF,
ERIC S. GOLDSTEIN FOR INTERVENING PLAINTIFF, MESSA,
THOMAS H. CYPHER FOR DEFENDANTS.

OPINION
LESLIE, COMMISSIONER

Plaintiff appeals from a decision of Magistrate Richard J. Anderson mailed August 4, 1997 (fn1 This case was ready for review on March 23. 1998.) denying plaintiff's claim for benefits based on a psychiatric disability. Plaintiff claims that the magistrate applied an incorrect definition of disability. Once the correct definition is applied, plaintiff contends that he meets that standard and is entitled to continuing benefits. Finally, plaintiff claims that events at work significantly contributed to his disability. Intervening plaintiff, MESSA, adopts plaintiff's brief on appeal. Defendants deny any legal or factual error in the magistrate's decision. We affirm the magistrate.

The litigation in this case was protracted and hard fought. Plaintiff was a long term school teacher for the Zeeland Public Schools. His antagonist was the

principal of the high school, Michael Jones. The magistrate succinctly described the conflict between the two:

"Plaintiff testified that during the years 1969 through 1978 he adjusted quite well to his principals and had no problems. Plaintiff stated that commencing in 1978, Michael Jones became high school principal. Plaintiff related that he had several ongoing disputes with Principal Jones. Plaintiff testified his primary conflict with Principal Jones was in preparing plans of assistance. Plaintiff testified he had ongoing problems with Principal Jones for the school year 1980 and 1981 over the plans of assistance. Plaintiff stated that during school year 1981-1982 he was laid off in September of 1981 because of a decline in enrollment. At this time the Plaintiff filed a grievance for his layoff. During the period 1982 through 1986 the Plaintiff was not called back, but did do substitute teaching at other school systems. Plaintiff testified that he was called back to work in November, 1986, when a teacher retired. Plaintiff continued with his regular teaching duties through the school year 1991, 1992. At this time the Plaintiff was classified, by Principal Jones, as a deficient teacher. Plaintiff stated he requested a transfer, away from Jones' school. Plaintiff testified that the school year 1992-1993 was the last year worked. Plaintiff stated he had ongoing conflicts with Principal Jones up through the last day that he worked for the school system. During this period of time, Plaintiff related that Principal Jones started making negative comments regarding his lesson plans. Plaintiff testified that this made him feel angry, and felt he was being picked upon. At this point an observer was sent in to monitor the Plaintiff's classes. Plaintiff stated he underwent several suspensions in March of 1993 and April of 1993 for not handing in his lesson plans on time. During this period of time Plaintiff stated that he lost sleep and became disoriented. Plaintiff's first day for the year 1993-1994 was 8/31/93. Plaintiff was not given any keys and was told that he could not teach.

Plaintiff went on short term disability and then long term disability later. At this time Plaintiff testified he began treating with Dr. Breyer. (fn 2 Magistrate's opinion at 2-3.)"

He also described plaintiff's testimony concerning events after his last day of work:

"Plaintiff testified that he could not return to Zeeland Public Schools because Jones was in charge of personnel. He stated emotionally he could not handle the job. Plaintiff admit (sic) that he could teach auto mechanics, industrial arts, and metal work in any other environment."

"Plaintiff testified that he was irate with his teacher's union because he did not feel they represented him properly in the grievance procedures against the school system. Plaintiff also testified that his father's death, during this period of time, did cause him some stress. Plaintiff also stated that commencing in January, 1992 he had an ongoing dispute with the City of Zeeland, over various ordinance citations."

"Plaintiff testified that he was mad at the City of Zeeland and its officials for citing him for violations of certain city codes. Plaintiff testified that he has not applied for work anywhere else since leaving Zeeland Public Schools, because he feels he is still an employee of that school system. He did admit that he applied for various part-time substitute teaching jobs. Plaintiff testified that he spent at least 30 hours per week on litigation during the Summer of 1993."

Finally, the magistrate reviewed the expert testimony in the case:

"Plaintiff took the testimony of John D. Breyer, D.O., a board certified psychiatric, who testified he first saw the Plaintiff on 9/3 0/93. On the occasion of this first visit, the Plaintiff complained to Dr. Breyer of problems with stress and pressures at work. The

Plaintiff related to Dr. Breyer that he felt that he was being harassed by the officials at Zeeland Public Schools. Dr. Breyer made a diagnosis of adjustment disorder with mixed emotional features. This physician testified that an adjustment disorder is one that develops in response to a stress or stressors that a person is under. Dr. Breyer was of the opinion that the Plaintiff s adjustment disorder was either caused or aggravated by the work environment that the Plaintiff was exposed to during the latter years of his employment at Zeeland Public Schools."

"Plaintiff also took the deposition of Robert W. Lampson, Ph.D., a psychologist, who examined the Plaintiff on 7/8/95. This examiner testified that based on the diagnostic interview, and psychometric testing, "the work situation - specifically Jerry's employer/employee relationship with Mr. Jones significantly contributed to Jerry current emotional condition as presented in the following section." He then went on to diagnose dysthymic disorder, an anxiety disorder as well as avoidant personality traits. This psychologist recommended that the Plaintiff be returned to work in his occupation as soon as possible with a stipulation that he not work under the supervision management or employment of Mr. Jones."

"Defendant took the deposition of Floyd Wessendorp, M.D., who first examined the Plaintiff on 2/4/93. On the occasion of the first visit with the Plaintiff Dr. Wessendorp indicated that he could make no diagnosis on the Plaintiff. Plaintiff returned to see Dr. Wessendorp on 2/11/93. Dr. Wessendorp testified he sent approximately two and a half hours with the Plaintiff. Following this visit Dr. Wessendorp indicated that he still could make no official diagnosis of the Plaintiff s condition. He did admit that the Plaintiff shows situational reaction with mixed emotional features, both depression and anxiety."

"Defendant also took the deposition of Howard G. Ager, M. D., a board certified psychiatrist, who examined the Plaintiff on 6/13/95. This physician was

of the opinion that the Plaintiff had a rather passive-aggressive personality, obsessive personality style and that he was also somewhat paranoid. Dr. Ager after an examination of the Plaintiff, could find no current objective signs of mental disorder. This physician did feel, however, that the Plaintiff may have passive-aggressive- obsessive compulsive, and paranoid personality traits. This physician was of the opinion that the Plaintiff was a rather tenacious individual, when it comes to something that he believes in. Dr. Ager testified that in his opinion the Plaintiff appears much too dogmatic and convinced of his own opinions to be w willing to listen to the insights or advice of another person. This physician was of the opinion that from a psychiatric basis, he did not believe the Plaintiff was in need of any restrictions in order to perform his previous job duties. (fn 4 Id. at 4-5.)"

After stating the governing standard for causal relationship, in mental disability cases, the magistrate denied plaintiff's claim with the following analysis:

"In the instant case, after reviewing the whole record, I find that the Plaintiff did not sustain any mental disability. Although Mr. Bush may have had some unpleasant experiences while working for the Principal Jones, I do not believe that they were sufficient to cause mental disability. "

"In reviewing the medical testimony elicited at trial, I found the testimony of Howard G. Ager, M.D., a board certified psychiatrist, most credible. This physician was of the opinion that the Plaintiff had a rather passive/aggressive personality, obsessive personality style and that he was also somewhat paranoid. Dr. Ager, after an examination of the Plaintiff, could find no current objective signs of mental disability. This physician did feel, however, that the Plaintiff may have passive/aggressive/obsessive compulsive, and paranoid personality traits. This physician was of the opinion that the Plaintiff was a

rather tenacious individual, when it comes to something that he believes in. Dr. Ager testified that in his opinion the Plaintiff appears much too dogmatic and convinced of his own opinions to be willing to listen to the insights or advice of another person."

"The Plaintiff points to the personality conflict he has with Principal Jones as being the cause of his emotional condition. The Plaintiff presented to me as a strong willed, single minded person who wants to vent his spleen against Principal Jones as a cause of his life's problems. But for the singular personality conflict with Jones, Plaintiff would still be working at Zeeland Public Schools or another system doing the same work. Plaintiff stated he could not return to work at Zeeland Public Schools because Jones was in charge. He did testify however, that he could teacher his speciality in another environment."

"To say that the Plaintiff has a litigious nature would be to engage in an understatement. A multitude of litigation ensued after his leaving the school system. These included lawsuits and grievances against the school system, lawsuits against his union, lawsuits against former attorneys and litigation involving the City of Zeeland."

"My observation of the Plaintiff disclosed no psychiatric disability. He is a highly intelligent person who is attempting to manipulate the legal system to justify his personal feelings about many issues. Our case law has held for many years, that a plaintiff in a workers' compensation case must prove the case by a preponderance of the evidence. See, Aquilina v General Motors Corporation, 403 Mich 206 [1978]. Our courts have further stated that the finder of fact may base its conclusions on reasonable inferences from the facts presented."

"In view of the fact that I find the Plaintiff not to be psychiatrically disabled, his claim for workers' compensation benefits must be denied." (fn 5 Id. at 6-8)

Plaintiff claims that the magistrate's decision erroneously applied a test of disability which ignores the governing law found in Haske v Transport Leasing, Inc, Indiana, 455 Mich 628 (1997). (fn 6 Plaintiff's brief at 16. Plaintiff acknowledges that Haske was not decided until two days after the magistrate's decision was issued.) Plaintiff relies on Haske for the proposition that inability to return to work at a single job within one's qualifications and training constitutes disability. Plaintiff argues that because Haske was not decided until after the magistrates decision was mailed and the magistrate did not cite any controlling law on the definition of disability, we must assume that he applied the governing law prior to Haske, which is now superceded. We are not persuaded by plaintiff's claim.

The magistrate's determination is that plaintiff does not suffer from any mental disability. Based on his own observations, he found plaintiff to be "a highly intelligent person who is attempting to manipulate the legal system to justify his personal feelings about many issues." He also accepted Dr. Ager's assessment that plaintiff has no mental disability, but a particular personality configuration which leads to personality conflict and inability to resolve situations. This is not a finding of mental incapacity to perform work as a result of injury. In short, the magistrate's factual finding is that plaintiff does not experience any mental impairment as a result of work. As a result, the magistrate's failure to mention a standard of disability is not erroneous. (fn 7 Although the preferred practice is for magistrate's to cite governing authority, the failure to do so is not in and of itself reversible error where, upon review, the applicable legal standard is evident from the decision. Harrington v Point of sale Demonstration Serv, Inc, 1997 ACO #135.) Under any standard of disability, failure to prove a mental limitation from injury requires denial of benefits.

Because of the magistrate's fact finding, plaintiffs remaining arguments are also unpersuasive. With respect to the claim of disability under Haske, plaintiff simply argues de novo for a determination that plaintiff is impaired because of mental injury. The existence of substantial evidence in the record contrary to the magistrate's finding is not a basis for reversal where the magistrate's actual findings are based on competent, material and substantial evidence. In this case we defer to the magistrate's credibility assessment and his choice of expert opinion. His decision is grounded on competent, material and substantial evidence on the whole record. (fn 8 Goff v Bil-Mar Foods (After Remand), 454 Mich 507, 514 (1997); Holden v Ford Motor Co, 439 Mich 257 (I 992); Kovach v Henry Ford Hospital, 207 Mich App 107 (1994).)

Likewise, plaintiffs argument that actual events significantly contributed to a mental disability is a request for the Commission to substitute its judgment for that of the magistrate on factual questions. We are prohibited from doing so.

We affirm the magistrate.

Commissioners Wyszynski and Kent concur.

/s/ Richard B. Leslie
/s/ James Edward Wyszynski, Jr.
/s/ James J. Kent
Commissioners
order date Jun. 29, 1999

STATE OF MICHIGAN
WORKER'S COMPENSATION BOARD OF
MAGISTRATES

GERALD D. BUSH, PLAINTIFF,
Vs
ZEELAND PUBLIC SCHOOLS
and CITIZENS INSURANCE COMPANY,DEFENDANTS.

APPEARANCES:Roy J. Portenga (P33101) appearing on behalf of Plaintiff.
Thomas Cypher (PI 2425) appearing on behalf of Defendants.
Margaret O'Donnell (P37528), Eric S. Goldstein (P45842), and John Charters (P23888) appearing on behalf of MESSA.

Trial Dates 2/26/96, 4/25/96, 5/23/96, 7/15/96, 8/19/96, 10/21/96, 12/12/96, 3/14/97, 4/28/97, and 6/I9/97

OPINION/ORDER

This matter was initiated with a filing of an application for mediation or hearing, dated 12/28/94. In that petition the Plaintiff alleged injury dates of 6/11/93, and 8/30/93. The Plaintiff, Gerald D. Bush, appeared and testified that he was born 7/20/45 and married to Carolyn. In addition to his wife, Carolyn, Plaintiff claimed as dependents his daughter, Suzanne born 10/1 1/84 and Paul born 11/10/76. Plaintiff testified he commenced employment at Zeeland Public Schools in September of 1969. The Plaintiff testified that after completing four years of college he received a B.A. degree from Western Michigan, and obtained his teaching certificate. Throughout the entire course of his tenure with Zeeland Public Schools, the Plaintiff taught auto mechanics and metal shop.

Plaintiff testified that during the years 1969 through 1978 he adjusted quite well to his principals and had no problems. Plaintiff stated that commencing

in 1978, Michael Jones became high school principal. Plaintiff related that he had several ongoing disputes with Principal Jones. Plaintiff testified his primary conflict with Principal Jones was in preparing plans of assistance. Plaintiff testified he had ongoing problems with Principal Jones for the school year 1980 and 1981 over the plans of assistance. Plaintiff stated that during school year 1981-1982 he was laid off in September of 1981 because of a decline in enrollment. At this time the Plaintiff filed a grievance for his layoff. During the period 1982 through 1986 the Plaintiff was not called back, but did do substitute teaching at other school systems. Plaintiff testified that he was called back to work in November, 1986, when a teacher retired. Plaintiff continued with his regular teaching duties through the school year 1991-1992. At this time the Plaintiff was classified, by Principal Jones as a deficient teacher. Plaintiff stated he requested a transfer, away from Jones' school. Plaintiff testified that the school year 1992-1993 was the last year worked. Plaintiff stated he had ongoing conflicts with Principal Jones up through the last day that he worked for the school system. During this period of time, Plaintiff related that Principal Jones started making negative comments regarding his lesson plans. Plaintiff testified that this made him feel angry, and felt he was being picked upon. At this point an observer was sent in to monitor the Plaintiff's classes. Plaintiff stated he underwent several suspensions in March of 1993 and April of 1993 for not handing in his lesson plans on time. During this period of time Plaintiff stated that he lost sleep and became disoriented. Plaintiff's first day for the year 1993-1994 was 8/31/93. Plaintiff was not given any keys and was told that he could not teach. Plaintiff went on short term disability and then long term disability later. At this time Plaintiff testified he began treating with Dr. Breyer. Plaintiff testified that he could not return to work at Zeeland Public Schools because Jones was in charge of personnel. He stated emotionally he could not handle the job. Plaintiff admit that he

could teach auto mechanics, industrial arts, and metal work in any other environment.

Plaintiff testified that he was irate with his teacher's union because he did not feel they represented him properly in the grievance procedures against the school system. Plaintiff also testified that his father's death, during this period of time, did cause him some stress. Plaintiff also stated that commencing in January, 1992 he had an ongoing dispute with the City of Zeeland, over various ordinance citations. Plaintiff testified that he was mad at the City of Zeeland and its officials for citing him for violations of certain city codes.

Plaintiff testified that he has not applied for work anywhere else since leaving Zeeland Public Schools, because he feels he is still an employee of that school system. He did admit that he applied for various part-time substitute teaching jobs. Plaintiff testified that he spent at least 30 hours per week on litigation during the Summer of 1993.

A considerable number of witnesses were called to attempt to prove that the Plaintiff's dismissal from the school system was justified. Several witnesses were called from the City of Zeeland to testify concerning the Plaintiff s litigious nature.

Plaintiff took the testimony of John D. Breyer, D. O., a board certified psychiatric, who testified he first saw the Plaintiff on 9/30/93. On the occasion of this first visit, the Plaintiff complained to Dr. Breyer of problems with stress and pressures at work. The Plaintiff related to Dr. Breyer that he felt that he was being harassed by the officials at Zeeland Public Schools. Dr. Breyer made a diagnosis of adjustment disorder with mixed emotional features. This physician testified that an adjustment disorder is one that develops in response to a stress or stressors that a person is under. Dr. Breyer was of the opinion that the Plaintiff's adjustment disorder was either caused or aggravated by the work environment that the Plaintiff

was exposed to during the latter years of his employment at Zeeland Public Schools.

Plaintiff also took the deposition of Robert W. Lampson, Ph. D., a psychologist, who examined the Plaintiff on 7/8/95. This examiner testified that based on the diagnostic interview, and psychometric testing, "the work situation - specifically Jerry's employer/employee relationship with Mr. Jones - significantly contributed to Jerry current emotional condition as presented in the following section." He then went on to diagnose dysthymic disorder, an anxiety disorder as well as avoidant personality traits. This psychologist recommended that the Plaintiff be returned to work in his occupation as soon as possible with a stipulation that he not work under the supervision management or employment of Mr. Jones.

Defendant took the deposition of Floyd Wessendorp, M. D., who first examined the Plaintiff on 2/4/93. On the occasion of the first visit with the Plaintiff Dr. Wessendorp indicated that he could make no diagnosis on the Plaintiff. Plaintiff returned to see Dr. Wessendorp on 2/11/93. Dr. Wessendorp testified he sent approximately two and a half hours with the Plaintiff. Following this visit Dr. Wessendorp indicated that he still could make no official diagnosis of the Plaintiff's condition. He did admit that the Plaintiff shows situational reaction with mixed emotional features, both depression and anxiety.

Defendant also took the deposition of Howard G. Ager, M. D., a board certified psychiatrist, who examined the Plaintiff on 6/13/95. This physician was of the opinion that the Plaintiff had a rather passive-aggressive personality, obsessive personality style and that he was also somewhat paranoid. Dr. Ager.after an examination of the Plaintiff could find no current objective signs of mental disorder. This physician did feel, however, that the Plaintiff may have passive-aggressive-obsessive-compulsive, and paranoid personality traits. This physician was of the opinion that the Plaintiff was a rather tenacious individual,

when it comes to something that he believes in. Dr. Ager testified that in his opinion the Plaintiff appears much too dogmatic and convinced of his own opinions to be willing to listen to the insights or advice of another person. This physician was of the opinion that from a psychiatric basis, he did not believe the Plaintiff was in need of any restrictions in order to perform his previous job duties.

DISCUSSION

The singular issue for determination, in this case, is whether or not the Plaintiff has proven a mental disability. In the case of Gardner v VanBuren Public Schools, 445 Mich 23 our Supreme Court has revisited the issue of what is required to show a compensable disability. The Gardner court stated:

"We hold that to establish a compensable mental disability claim, pursuant to MCL. 418.301(2); MSA 17.237(301(2), a claimant must prove. (1) a mental disability, (2) arising out of the actual events of employment, not unfounded perceptions thereof, and that (3) those events contributed to, aggravated, or accelerated the mental disability in a significant manner."

The Gardner court also stated:

"Under the statutory standard, causation is determined by the fact finder. It is not determined by the honest, even if unfounded, perceptions of the claimant. In determining whether specific events of employment contribute to, aggravate, or accelerate a mental disability in a significant manner, the fact finder must consider the totality of the occupational circumstances along with the totality of a claimant's mental health in general."

"The analysis must focus on whether actual events of employment affected the mental health of the claimant in a significant manner. This analysis will, by necessity, require a comparison of nonemployment and

employment factors. Once actual employment events have been shown to have occurred, the significance of those events to the particular claimant must be judged against all the circumstances to determine whether the resulting mental disability is compensable."

The three pronged test in **Gardner** requires, first of all, that a mental disability be proven. In the instant case, after reviewing the whole record, I find that the Plaintiff did not sustain any mental disability. Although Mr. Bush may have had some unpleasant experiences while working for the Principal Jones, I do not believe that they were sufficient to cause mental disability.

In reviewing the medical testimony elicited at trial, I found the testimony of Howard G. Ager, M. D., a board certified psychiatrist, most credible. This physician was of the opinion that the Plaintiff had a rather passive/aggressive personality, obsessive personality style and that he was also somewhat paranoid. Dr. Ager, after an examination of the Plaintiff, could find no current objective signs of mental disability. This physician did feel, however, that the Plaintiff may have passive/aggressive/obsessive compulsive, and paranoid personality traits. This physician was of the opinion that the Plaintiff was a rather tenacious individual, when it comes to something that he believes in. Dr. Ager testified that in his opinion the Plaintiff appears much too dogmatic and convinced of his own opinions to be willing to listen to the insights or advice of another person.

The Plaintiff points to the personality conflict he has with Principal Jones as being the cause of his emotional condition. The Plaintiff presented to me as a strong willed, single minded person who wants to vent his spleen against Principal Jones as a cause of his life's problems. But for the singular personality conflict with Jones, Plaintiff would still be working at Zeeland Public Schools or another system doing the same work. Plaintiff stated he could not return to work at Zeeland Public Schools because Jones was in charge. He did

testify however, that he could teacher his speciality in another environment.

To say that the Plaintiff has a litigious nature would be to engage in an understatement. A multitude of litigation ensued after his leaving the school system. These included lawsuits and grievances against the school system, lawsuits against his union, lawsuits against former attorneys and litigation involving the City of Zeeland.

psychiatric disability. He is a highly intelligent person who is attempting to manipulate the legal system to justify his personal feelings about many issues.

Our case law has held for many years, that a plaintiff in a workers' My observation of the Plaintiff disclosed no compensation case must prove the case by a preponderance of the evidence. See Aguilina v General Motors Corporation, 403 Mich 206. Our courts have further stated that the finder of fact may base its conclusions on reasonable inferences from the facts presented.

In view of the fact that I find the Plaintiff not to be psychiatrically disabled, his claim for workers' compensation benefits must be denied.

/s/ Richard J. Anderson, Magistrate #160G
Date: JULY 28, 1997

TEACHERS' TENURE Act 4 of 1937 (Ex . Sess.)

AN ACT relative to continuing tenure of office of certificated teachers in public educational institutions; to provide for probationary periods; to regulate discharges or demotions; to provide for resignations and leaves of absence; to create a state tenure commission and to prescribe the powers and duties thereof; and to prescribe penalties for violation of the provisions of this act.

History: 1937, Ex. Sess., Act 4, Eff. Sept. Act 2, Eff. Aug. 28, 1964. 937; Am. 1964

The People of the State of Michigan enact:

ARTICLE I DEFINITIONS.

38.71 "Teacher" defined.
Sec. 1. (1) The term "teacher" as used in this act means a certificated individual employed for a full school year by any board of education or controlling board.

(2) An individual who is not certificated but is employed for a full school year pursuant to section 1233b of the school code of 1976, Act No. 451 of the Public Acts of 1976, being section 380.1233b of the Michigan Compiled Laws, or is employed pursuant to an annual vocational authorization or a temporary approval, as defined in state board rule, is considered to be a teacher for the purpose of serving the probationary period under article II, but such an individual is not considered a teacher for the purpose of continuing tenure under article III until he or she becomes certificated.

(3) An individual employed as a teacher in a public school academy established under part 6a of Act No. 451 of the Public Acts of 1976, being sections 380.501 to 380.510 of the Michigan Compiled Laws, is not

considered a teacher during that employment for the purpose of continuing tenure under article III. However, an individual described in section 1 (4) of article III is a teacher for the purpose of retaining continuing tenure as described in that section.

(4) Teacher does not include an individual whose teaching certificate has expired or has been suspended or revoked.

History: 1937, Ex. Sess. Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.71;--Am. 1967, Act 216, Imd. Eff. July 10, 1967;-Ain. 1993, Act 59, Imd. Eff. June 11, 1993;--Am. 1993, Act 337, Imd. Eff. Dec. 31, 1993.

Cited in other sections: Section 38.71 et seq. is cited in SS 15.263, 380.171, 380.175, 380.184, 380.948, 380.1742, 380.1743, and 380.1766.

36.72 "Certificated" defined.

Sec. 2. The term "certificated" means holding a valid teaching certificate, as defined by the state board of education. For the purpose of this section, an individual is considered to be holding a valid teaching certificate if the individual has on file with his or her employing school district either an appropriate teaching certificate issued by the state board of education or, if the individuals application for a teaching certificate has not been confirmed or if rejected by the state board, written evidence from the individual's teacher education college that he or she meets the requirements described in section 1535 of the school code of 1976, Act No. 451 of the Public Acts of 1976, being section 380.1535 of the Michigan Compiled Laws.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.72;--Am. 1967, Act 216, Imd. Eff. July 10, 1967;--Am. 1993, Act 59, Imd. Eff. June 11, 1993.

Administrative rules: R 390.661 of the Michigan Administrative Code.

38.73 "Controlling board" defined.

Sec. 3. As used in this act, "controlling board" means all boards having the care, management, or control over public school districts and public educational institutions other than a bl'c school academy established under part 6a of the school code c)t-1976, Act No. 451 of the Public Acts of 1976, being sections 380.501 to 380.510 of the Michigan Compiled Laws.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.73;--Am. 1993, Act 337, Imd. Eff. Dec. 31, 1993.

38.74 "Demote" defined.

Sec. 4. The word "demote" means to reduce compensation for a particular school year by more than an amount equivalent to 3 days' compensation or to transfer to a position carrying a lower salary.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.74;--Am. 1993, Act 60, Eff. Oct. 1, 1993.

38.75 School year; definition.

Sec. 5. The "school year" shall be defined as the legal school year at the time and place where service was rendered.

History: 1 937, Ex. Sess., Act 4, Eff. Sept. 1, 1937; --CL 1948, 38.75

ARTICLE II. PROBATIONARY PERIOD.

38.81 Teachers' probationary period; continuing tenure.

Sec.1. (1) Subject to subsections (2) and (3), a teacher is in a probationary period during his or her first 4 full school years of employment.

(2) A teacher under contract but not on continuing tenure as of the effective date of the amendatory act that added this subsection is in a probationary period during his or her first 2 full school years of employment.

(3) A teacher on continuing tenure as of the effective date of the amendatory act that added this subsection continues to be on continuing tenure even if the teacher has not served for at least 4 full school years of employment.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.82;--Am 1993, Act 59, Imd. Eff. June 11, 1993.

Transfer of powers: see 16.406
Cited in other sections: Sections 38.81 to 38.191 are cited in S 16.406.

38.82 Probationary period; granting third year of probation.

Sec. 2. A teacher shall not be required to serve more than 1 probationary period in any 1 school district or institution. However, upon notice to the tenure commission, the controlling board may grant a third year of probation to a teacher described in section 1(2) of this article.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.82;--Ain. 1993, Act 59, Imd. Eff. June 11, 1993.

38.83 Controlling board; statements of performance and notices of dismissal, issuance to probationary teachers.

Sec. 3. At least 60 days before the close of each school year the controlling board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory. Failure to submit a written statement shall be considered as conclusive evidence that the teacher's work is satisfactory. Any probationary teacher or teacher not on continuing contract shall be employed for the ensuing year unless notified in writing at least 60 days before the close of the school year that his services will be discontinued.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.83;--Am. 1967, Act 216, Imd. Eff. July 10, 1967.

38.83a Teacher in probationary period; individualized development plan; performance evaluation; Failure to comply with subsection (I) as evidence of satisfactory performance.

Sec. 3a. (1) If a probationary teacher is employed by a school district for at least 1 full school year, the controlling board of the probationary teacher's employing school district shall ensure that the teacher is provided with an individualized development plan developed appropriate administrative personnel in consultation with the individual teacher and that the teacher is provided with at least an annual year-end performance evaluation each ear during the teacher's probationary period. The annual year-end performance evaluation shall be based on, but is not limited to, at least 2 classroom observations held at least 60 days apart, unless a shorter interval between the 2 classroom observations is mutually agreed upon by the teacher and the administration, and shall include at

least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan. This subsection does not prevent a collective bargaining agreement between the controlling board and the teacher's bargaining representative under Act No. 336 of the Public Acts of 1947, being sections 423.201 to 423.216 of the Michigan Compiled Laws, from providing for more performance evaluations or classroom observations in addition to those required under this subsection. Except as specifically stated in this subsection, this section does not require a particular method for conducting a performance evaluation or classroom observation or for providing an individualized development plan.

(2) Failure of a school district to comply with subsection (1) with respect to an individual teacher in a particular school year is conclusive evidence that the teacher's performance for that school year was satisfactory.

History: Add. 1993, Act 59, Imd. Eff. June 11, 1993.

38.84 Probationary period, portions of act inapplicable.

Sec. 4. Articles 4, 5 and 6 shall not apply to any teacher deemed to be in a period of probation.

History: Add. 1963, Act 242, Eff. Sept. 6, 1963.

ARTICLE III. CONTINUING TENURE.

38.91 Teacher on continuing tenure; program operated by consortium of districts; teacher employed in public school academy; adult education; contracts of employment in other than classroom; salary; extra duty for extra pay.

Sec. 1. (1) After the satisfactory completion of the probationary period, a teacher shall be employed

continuously by the controlling board under which the probationary period has been completed, and shall not be dismissed or demoted except as specified in this act.

(2) If a teacher employed in a program operated by a consortium of school districts was previously on continuing tenure in a school district that Participates in the consortium, the teacher shall be considered to be on continuing tenure only in that school district.

(3) If a teacher employed in a program operated by a consortium of school districts was not previously on continuing tenure in a school district that participates in the consortium and satisfactorily completes the probationer period the teacher shall be considered to be yon continuing tenure only in the school district that is the fiscal agent for the consortium. However, if there is a written agreement between the teacher and another participating school district that provides that the teacher will have continuing tenure in that school district, the teacher shall be considered to be on continuing tenure only in that school district and shall not be considered to be on continuing tenure in the school district that is the fiscal agent for the consortium.

(4) If a teacher employed in a public school academy established under part 6a of the school code of 1976, Act No. 451 of the Public Acts of 1976, being sections 380.501 to 380.510 of the Michigan Compiled Laws, is on leave of absence from a school district and was on continuing tenure in the school district at the time he or she began the leave of absence, the teacher retains continuing tenure in that school district during the period he or she is employed in the public school academy.

(5) If a teacher satisfactorily completes the probationary period as an adult education teacher, the teacher shall be considered to be on continuing tenure in the school

district only for adult education and shall not by virtue of completing the probationary period as an adult education teacher be considered to be on continuing tenure in the school district for elementary and secondary education.

(6) If a teacher satisfactorily completes the Probationary period as an elementary or secondary education teacher, the teacher shall be considered to be on continuing tenure in the school district only for elementary and secondary education and shall not by virtue of completing the probationary period as an elementary or secondary education teacher be considers to be on continuing tenure in the school district for adult education.

(7) If the controlling board provides in a contract of employment of a teacher employed other than as a classroom teacher, including but not limited to, a superintendent, assistant superintendent, principal, department head or director of curriculum, made with the teacher after the completion of the probationary period, that the teacher shall not be considered to be granted continuing tenure in that other capacity by virtue of the contract of employment, then the teacher shall not be granted tenure in that other capacity, but shall be considered to have been granted continuing tenure as an active classroom teacher in the school district. Upon the termination of such a contract of employment, if the controlling board does not reemploy the teacher under contract in the capacity covered by the contract, the teacher shall be continuously employed by the controlling board as an active classroom teacher. Failure of a controlling board to reemploy a teacher in any such capacity upon the termination of any such contract of employment described in this subsection shall not be considered to be a demotion under this act. The salary in the position to which the teacher is assigned shall be the same as if the teacher had been continuously employed in the

newly assigned position. Failure of a controlling board to so provide in any such contract of employment of a teacher in a capacity other than a class- room teacher shall be considered to constitute the employment of the teacher on continuing contract in the other capacity and subject to this act.

(8) Continuing tenure does not apply to an annual assignment of extra duty for extra pay.

History: 1937, Ex. Sess, Act 4, Eff. Sept. 1, 1937;--Am. 1941, Act 119, Imd. Eff. May 23, 1941;--CL 1948, 35.91;--Am. 1963, Act 242, Eff. Sept. 6, 1963;--Am. 1993, Act 59, Imd. Eff. June 11, 1993;--Am. 1993, Act 337, Imd. Eff. Dec. 31, 1993.

38.92 Teacher on continuing tenure; employment by another controlling board.

Sec. 2. If a teacher on continuing tenure is employed by another controlling board, the teacher is not subject to another probationary period of more than 2 years beginning with the date of employment, and may at the option of the controlling board be placed immediately on continuing tenure. A notice provided under section 3 of article 2 shall be given not later than 60 days before the completion of the probationary period. If a teacher on continuing tenure becomes an employee of another controlling board as a result of school district annexation, consolidation or other form of school district reorganization, the teacher shall be placed on continuing tenure within 30 days unless the controlling board, by a 2/3 vote on an individual basis, places the teacher on not more than 2 years' probation. However, if such a teacher is under contract but not on continuing tenure with the employing board as of the effective date of the amendatory act that added this sentence, the teacher is not subject to another probationary period of more than 1 year beginning with the date of employment.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.92;--Am. 1967, Act 216, Imd. Eff. July 10, 1967;-Am. 1993, Act 59, Imd. Eff. June 11, 1993.

38.93 Teacher on continuing tenure; individualized development plan; performance evaluation; failure to comply with subsection (1) as evidence of satisfactory performance.

Sec. 3. (1) The controlling board of the school district employing a teacher on continuing tenure shall ensure that the teacher is provided with a performance evaluation at least once every 3 years and, if the teacher has received a less than satisfactory performance evaluation, the school district shall provide the teacher with an individualized development plan developed by appropriate administrative personnel in consultation with the individual teacher. The performance evaluation shall be based on, but is not limited to, at least 2 classroom observations conducted during the period covered by the evaluation and, if the teacher has an individualized development plan, shall include at least an assessment of the teacher's progress in meeting the goals of his or her individualized development plan. This section does not prevent a collective bargaining agreement between the controlling board and the teacher's bargaining representative under Act No. 336 of the Public Acts of 1947, being sections 423.201 to 423.216 of the Michigan Compiled Laws, from providing for more performance evaluations or classroom observations in addition to those required under this section. Except as specifically stated in this subsection, this section does not require a particular method for conducting a performance evaluation or classroom observation or for providing an individualized development plan.

(2) Failure of a school district to comply with subsection (1) with respect to an individual teacher in a particular

3-year period is conclusive evidence that the teacher's performance for that period was satisfactory.

History: Add. 1993, Act 59, Imd. Eff. June 11, 1993.

ARTICLE IV. DISCHARGE, DEMOTION OR RETIREMENT.

38.101 Teacher on continuing tenure; discharge, demotion or retirement; continuation of contracts of teachers over retirement age.

Sec. 1. Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause and only as provided in this act. This act does not prevent any controlling board from establishing a reasonable policy for retirement to apply equally to all teachers who are eligible for retirement under the public school employees retirement act of 1979, Act No. 300 of the Public Acts of 1980, being sections 38.1301 to 38.1408 of the Michigan Compiled Laws, or, having established a reasonable retirement age policy, from temporarily continuing on a year-to-year basis on criteria equally applied to all teachers the contract of any teacher whom the controlling board might wish to retain beyond the established retirement age for the benefit of the school system.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--Am. 1941, Act 119, Imd. Eff. May 23, 1941;--CL 1948, 38.101;--Am 1966 Act 15, Imd. Eff. Apr. 6, 1966;--Am. 1993, Act 60, Eff. Oct. 1, 1993.
Compiler's note: Act 136 of 1945, referred to in this section, was repealed by Act 300 of 1980.

38.102 Charges against teacher; filing with controlling board; decision to proceed upon charges; written statement of charges and teacher's rights.

Sec. 2. All charges against a teacher shall be made in

writing, signed by the person making the charges, and filed with the secretary, clerk, or other designated officer of the controlling board, and a copy of the charges shall be provided to the teacher. The charges shall specify a proposed outcome of either discharge or a specific demotion of the teacher. The controlling board shall decide whether or not to proceed upon the charges, or may modify the charges and decide to proceed upon the charges as modified, not later than 10 days after the charges are filed with the controlling board. A decision to proceed upon the charges shall not be made except by a majority vote of the controlling board and shall be reduced to writing. The controlling board, if it decides to proceed upon the charges, shall furnish the teacher not later than 5 days after deciding to proceed upon the charges with the written decision to proceed upon the charges, a written statement of the charges and a statement of the teacher's rights under this article.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.102;--Am. 1967, Act 216, Imd. Eff. July 10, 1967;--Am. 1993, Act 60, Eff. Oct. 1, 1993.

38.103 Suspension of teacher pending certain conditions; compensation.

Sec. 3. (1) On the filing of charges in accordance with this article, the controlling board may suspend the accused teacher from active performance of duty until 1 of the following occurs:

(a) The teacher fails to contest the decision to proceed upon the charges within the time period specified in section 4(i) or this article.

(b) A preliminary decision and order discharging or demoting the teacher is issued by the administrative law judge under section 4(5)(i) of this article.

(c) If the preliminary decision and order is to reinstate the teacher, a final decision and order is rendered by the tenure commission under section 4(5)(m) of this article.

(2) If a teacher is suspended as described in subsection (1), the teacher's salary shall continue during the suspension. However, if the teacher is convicted of a felony the controlling board may discontinue the teacher's salary effective upon the date of the conviction.

(3) If a preliminary decision and order discharging a teacher is issued by the administrative law judge and the tenure commission subsequently reverses the preliminary decision and order of the administrative law judge, the tenure commission may order back pay.

History: 1937, Ex. Sess., Act 4, Eff. Sept. . 1, 1937;--CL 1948, 38.103;--Am. 1993, Act 60, Eff. Oct. 1, 1993.

38.104 Decision to proceed upon charges; appeal with tenure commission; filing; notice; conduct of hearing; dismissal of appeal or denial of discharge or demotion; appeal to court of appeals.

Sec. 4. (1) A teacher on continuing tenure may contest the controlling board's decision to proceed upon the charges against the teacher by filing a claim of appeal with the tenure commission and serving a copy of the claim of appeal on the controlling board not later than 20 days after receipt of the controlling board's decision. The controlling board shall file its answer with the tenure commission and serve a copy of the answer on the teacher not later than 10 days after service of the claim of appeal. If the teacher does not contest the controlling board's decision in the time and manner specified in this subsection, the discharge or demotion specified in the charges takes effect and the teacher shall be considered to have waived any right to contest

the discharge or demotion under this act.

(2) An administrative law judge described in subsection (3) shall furnish to each party without undue delay a notice of hearing fixing the date and place of the hearing. The hearing date shall not be less than 10 days after the date the notice of hearing is furnished and shall not be more than 60 days after service of the controlling board's answer unless the tenure commission grants a delay for good cause shown by the teacher or controlling board.

(3) The hearing shall be conducted by an administrative law judge who is an attorney licensed to practice law in this state and is employed by the department of education. An administrative law judge who conducts hearings under this section shall not advise the tenure commission or otherwise participate in a tenure commission review of an administrative law judge's preliminary decision and order under this section.

(4) Except as otherwise provided in this section, the hearing shall be conducted in accordance with chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.271 to 24.287 of the Michigan Compiled Laws, and in accordance with rules promulgated by the tenure commission.

(5) The hearing and tenure commission review shall be conducted in accordance with the following:

(a)The hearing shall be public or private at the option of the teacher.

(b)The hearing shall be held at a convenient place in the county in which all or a portion of the school district is located or, if mutually agreed by the parties, at the tenure commission offices in Lansing. The administrative law judge's necessary travel expenses

associated with conducting the hearing outside Lansing shall be borne equally by the tenure commission an the controlling board.

(c) Both the teacher and the controlling board may be represented by legal counsel.

(d) Testimony at the hearing shall be on oath or affirmation.

(e) A stenographer shall make a full record of the proceedings of the hearing. The cost of employing the stenographer and of providing the record shall be borne equally by the tenure commission and the controlling board.

(f) The administrative law judge may subpoena witnesses and documentary evidence on his or her own motion, and shall do so at the request of the controlling board or the teacher. If a person refuses to appear and testify in answer to a subpoena issued by the administrative law judge, the party on whose behalf the subpoena was issued may file a petition in the circuit court for the county in which the hearing is held for an order requiring compliance. Failure to obey such an order of the court may be punished by the court as contempt.

(g) The hearing shall be concluded not later than 90 days, after the teacher's claim of appeal was filed with the tenure commission.

(h) The administrative law judge shall make the necessary orders ensure to ensure that the case is submitted for decision not later than 50 days after the hearing is concluded.

(i) Not later than 60 days after submission of the case for decision, the administrative law judge shall serve a preliminary decision and order in writing upon each

party or the party's attorney and the tenure commission. The preliminary decision and order shall grant, deny, or modify the discharge or demotion specified in the charges.

(j) Not later than 20 days after service of the preliminary decision and order, a party may file with the tenure commission a statement of exceptions to the preliminary decision and order or to any part of the record or proceedings, including, but not limited to, rulings on motions or objections, along with a written brief in sup- port of the exceptions. The party shall serve a copy of the statement of exceptions and brief upon each of the other parties within the time limit for filing the exceptions and brief. If there are no exceptions timely filed, the preliminary decision and order becomes the tenure commission's final decision and order.

(k) Not later than 10 days after being served with the other party's exceptions and brief, a party may file a statement of cross-exceptions responding to the other party's exceptions or a statement in support of the preliminary decision and order with the tenure commission, along with a written brief in support of the cross-exceptions or of t he preliminary decision and order. The party shall serve a copy of the statement of cross-exceptions or the statement in support of the preliminary decision and order and a copy of the brief on each of the other parties.

(l) A matter that is not included in a statement of exceptions filed under subdivision (j) or in a statement of cross-exceptions filed under subdivision (k) is considered waived and cannot be heard before the tenure commission or on appeal to the court of appeals.

(m) If exceptions are filed, the tenure commission, after review of the record and the exceptions, may adopt, modify, or reverse the preliminary decision and order.

The tenure commission shall not hear any additional evidence and its review shall be limited to consideration of the issues raised in the exceptions based solely on the evidence contained in the record from the hearing. The tenure commission shall issue its final decision and order not later than 60 days after the exceptions are filed.

(6) After giving the party notice and an opportunity to comply, the administrative law judge or the tenure commission may dismiss an appeal or deny a discharge or demotion for a party's lack of progress or for a party's repeated failure to comply with the procedures specified in this section or the tenure commission's rules.

(7) A. party aggrieved by a final decision and order of the tenure commission may appeal the decision and order to the court of appeals in accordance with the Michigan court rules within 20 days after the date of the decision and order.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937; --CL1948, 38.104;--Am. 1993, Act 60, Eff. Oct. 1, 1993.

38.104a Hearing where witness testifies as alleged victim of sexual, physical, or psychological abuse; definitions; use of dolls or mannequins; support person; notice; ruling on objection; exclusion of persons not necessary to proceeding; section additional to other protections or procedures; hearings to which section applicable; effective date.

Sec. 4a. (1) As used in this section:

(a) "Developmental disability" means an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:
(i) It originated before the person became 18 years of age.

(ii) It has continued since its origination or can be expected to continue indefinitely.

(iii) It constitutes a substantial burden to the impaired person's ability to perform normally in society.

(iv) It is attributable to mental retardation, autism, or any other condition of a person found closely related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.

(b) "Witness" means an alleged victim under subsection (2) who is either of the following:

(i) A person under 15 years of age.

(ii) A person 15 years of age or older with a developmental disability.

(2) This section only applies to a hearing held pursuant to this article where a witness testifies as an alleged victim of sexual, physical, or psychological abuse. "Psychological abuse" means an injury to a child's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress.

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the

witness, and shall give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The controlling board shall rule on any objection to the use of a named support person prior to the date at which the witness desires to use the support person.

(5) In a hearing under this section, all persons not necessary to the proceeding shall be excluded during the witness's testimony.

(6) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

(7) This section applies to hearings beginning on or after January 1, 1988.

(8) This section shall take effect January 1, 1988.

History: Add. 1987, Act 47, Eff. Jan. I

38.105 Necessary reduction in personnel; first vacancy.

Sec. 5. For a period of 3 years after the effective date of the termination of the teacher's services, a teacher on continuing tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which the teacher is certificated and qualified. However, for a teacher on continuing tenure in a school district whose services were terminated before the effective date of the amendatory act that added this sentence, the teacher's right under this section to be appointed to the first vacancy in the school district for which the teacher is certificated and qualified shall continue for a period

of 3 years after the effective date of the amendatory act that added this sentence. This section does not prevent a school district from reemploying after the 3-year period specified in this section a teacher described in this section who was previously employed in that school district.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.105;--Am. 1993, Act 59, Imd. Eff. June 11, 1993.

Constitutionality: Neither the teacher tenure act nor due process requires a full evidentiary hearing by a school board before the board may remove from a recall list the name of a laid-off teacher who has abandoned the right to recall. ***Tomiak v. Hamtramck School District,*** 426 Mich. 678, 397 NW2d 770 (1986).

ARTICLE V RESIGNATION AND LEAVE OF ABSENCE

38.111 Resignation or leave of absence; notice required.

Sec. 1. No teacher on continuing tenure shall discontinue his services with any controlling board except by mutual consent, without giving a written notice to said controlling board at least 60 days before September first of the ensuing school year. Any teacher discontinuing his services in any other manner than as provided in this section shall forfeit his rights to continuing tenure previously acquired under this act.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.111.

38.112 Leave of absence; physical or mental disability.

Sec. 2. Any controlling board upon written request of a teacher may grant leave of absence for a period not to

exceed 1 year, subject to renewal at the will of the board: Provided, That without request, leave of absence because of physical or mental disability may be granted by any controlling board for a period not to exceed 1 year: Provided further, That any teacher so placed on leave of absence shall have the right to a hearing on such unrequested leave of absence in accordance with the provisions for a hearing in article 4, section 4 of this act: Provided, That no leave of absence shall serve to terminate continuing tenure previously acquired under this act.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937; CL 1948, 38.112.

ARTICLE VI RIGHT TO APPEAL.

38.121 Appeal to state tenure commission; notice; hearing.

Sec. 1. A teacher who has achieved continuing tenure status may appeal to the tenure commission any decision of a controlling board under this act, other than a decision governed by article IV on discharge or demotion of a teacher on continuing tenure, within 20 days from the date of the decision. The tenure commission shall provide for a hearing on the appeal. Notice and conduct of the hearing shall be the same as provided in article IV and in rules promulgated by the tenure commission.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.121; Am 1963, Act 242, Eff. Sept. 6, 1963;--Am. 1993, Act 60, Am. Eff. Oct. 1, 1993.

Administrative rules;: R 38.131 et seq of the Administrative Code.

ARTICLE VII. STATE TENURE COMMISSION

38.131 State tenure commission; creation, membership; superintendent as ex-officio secretary; legal advisor.

Sec. 1. There is hereby created a state tenure commission of 5 members: 2 of whom shall be classroom instructors, 1 a member of a board of education of a graded or city school district, 1 a person not a member of a board of education or a teacher, and 1 a superintendent of schools. The superintendent of public instruction shall be ex officio secretary of the commission, and the attorney general shall assign to the commission an assistant who shall be legal advisor to the commission.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 38.131;--CL 1948, 38.131;--Am. 1963, Act 242, Eff. Sept. **6,** 1963

38.132 Tenure commission; members, appointment, terms, vacancies.

Sec. 2. Within 30 days after the effective date of this act, the governor shall appoint the members of the tenure commission for the following terms: One for a term of 3 years, 1 for a term of 2 years and 1 for a term of 1 year. Each term shall begin on the first day of September. Immediately preceding the expiration of their respective terms the governor shall appoint succeeding members of the tenure commission for terms of 5 years. In the event of a vacancy on the tenure commission the governor shall immediately appoint a successor to complete the unexpired term.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38. 1 32.

38.133 Tenure commission; geographical qualifications of members.

Sec. 3. Not more than 1 member of the tenure commission shall be appointed from any 1 school district.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.133.

38.134 Tenure commission; qualifications of teacher member

Sec. 4. Any teacher appointed to the tenure commission after September 1, 1938, must be on continuing tenure.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.134.

38.135 Tenure commission; membership of teacher not to affect tenure.

Sec. 5. Membership on the state tenure commission shall not adversely affect the status of the teacher's tenure with a controlling board.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.135.

38.136 Tenure commission; times and places of meetings; conducting business at public meeting; notice of meeting.

Sec. 6. (1) The tenure commission shall meet twice a year at stated times in the city of Lansing, and at other times and in other places as determined by the commission.

(2) The business which the commission may perform shall be conducted in compliance with Act No. 267 of

the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws. Public notice of the time, date, and place of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.136;--Am. 1977, Act 252, Imd. Eff. Dec. 6, 1977.

38.137 Tenure commission; powers.

Sec. 7. The tenure commission is hereby vested with such powers as are necessary to carry out and enforce the provisions of this act.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.137.

38.138 Tenure commission; compensation and expenses.

Sec. 8. The per diem compensation of the state tenure commission and the schedule for reimbursement of expenses shall be established annually by the legislature.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38.138;--Am. 1965, Act 8, Imd. Eff. Apr. 8, 1965;--Am. 1975, Act 56, Imd. Eff. May 20, 1975.

38.139 Tenure commission; board of review for cases appealed from decision of controlling board; location of records; availability of certain writings to public.

Sec. 9. (1) The tenure commission shall act as a board of review for all cases appealed from the decision of a controlling board. All records of the tenure commission shall be kept in the office of the superintendent of

public instruction.

(2) A writing prepared, owned, used in the possession of, or retained by the commission in the performance of an official function shall be made available to the public in compliance with the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

History: 1937, Ex. Sess., Act 4, Eff. Se t. 1, 1937;--CL 1948, 38.139;--Am. 1963, Act 242, Eff. Sept. 6, 1963;-Am. 1977, Act 252, Imd. Eff. Dec. 6, 1977;--Am. 1993, Act 60, Eff. Oct. 1, 1993.

38.140 Tenure commission; organizational meeting, election of officers, rules and regulations.

Sec. 10. Within 30 days after the effective date of this act, the tenure commission shall hold a meeting in the city of Lansing for the purpose of organization and the election of a chairman and secretary, got of whom shall be members of the commission. The tenure commission shall draw up rules and regulations and shall have the power to amend same and to provide for the conduct of its affairs in such manner as shall be consistent with the provisions of this act.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937; CL 1948, 38.140.
Administrative rules: R 38.131 et seq. of Michigan Administrative Code.

38.141 Repealed. 1965, Act 8, Imd. Eff - Apr. 8, 1965.
Compiler's note: The repealed section provided two-year appropriation for expenses of the tenure commission.

ARTICLE VIII. DISTRICTS.

38.151 Application of act.

Sec. I . This act shall apply to all school districts of the state.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948,
38.151;--Am. 1964, Act 2, Eff. Aug. 28, 1964.

38.152 Repealed. 1964, Act 2, Eff . Aug. 28, 1964.
Compiler's note: The repealed section provided that school district board shall notify the superintendent of public instruction of results of election.

ARTICLE IX PENALTY

38.161 Violation of act; penalty.

Sec. 1. Failure of any member of a controlling board to comply with any provisions of this act shall be deemed a violation of the law and shall subject said member to the same penalty as prescribed for a violation o@ the general school law.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;p – CL 1948, 38.161.

ARTICLE X. INCONSISTENT ACTS.

Uncompiled section: Section I of Art. **X** of this act was not compiled.
38.172 Teachers; waiver of rights in contracts prohibited.

Sec. 2. No teacher may waive any rights and privileges under this act in any contract or agreement made with a controlling board. In the event that any section or sections of a contract or agreement entered into

between a teacher and a controlling board make continuance of employment of such teacher contingent upon certain conditions which may be interpreted as contrary to the reasonable and just causes for dismissals, provided by this act, such section or sections of a contract or agreement shall be invalid and of no effect in relation to determination of continuance of employment of such teacher.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;p – CL 1948, 38.172.

Uncompiled section: Section 1 of Art. XI of this act was not compiled.

ARTICLE XII

38.191 Effective date.

Sec. 1. This act shall take effect and be in force from and after September first, 1937.

History: 1937, Ex. Sess., Act 4, Eff. Sept. 1, 1937;--CL 1948, 38. 191.

William K. Suter
Clerk of the Court

March 20, 2001

Mr. Gerald D. Bush
724 E. Central
Zeeland, Mi. 49464

Re: Gerald D. Bush
v Board of Education of Zeeland
Public Schools
Application No. 00A806

Dear Mr. Bush:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on March 20, 2001, extended the time to and including May 26, 2001.

This letter has been sent to those designed on the attached notification list.

Sincerely,
William K. Suter, Clerk
By /s/ Loretta S. Ruffin
Loretta S. Ruffin
Assistant Clerk